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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 41

JOHN THOMAS AVENT, ET AL., PETITIONERS,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED MAY 4, 1961
CERTIORARI GRANTED JUNE 25, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 11

JOHN THOMAS AVENT, ET AL., PETITIONERS,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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[fol. 2]

Before Mallard, J., June 30, 1960, Criminal Term, Durham Superior Court, Defendants Appealed.

IN THE SUPERIOR COURT OF DURHAM COUNTY, NORTH CAROLINA

State of North Carolina
Durham County:

Be It Remembered that a Superior Court duly and regularly begun and held for the County of Durham, at a time and place required by law, to wit, at the Courthouse in Durham, on the fifteenth Monday after the first Monday in March, 1960, before the Honorable Raymond B. Mallard, Judge, duly commissioned, authorized and empowered to hold said Court. Whereupon the following proceedings were had.

INDICTMENT—John Thomas Avent:

SUPERIOR COURT

June Criminal Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N.C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its [fol. 3] manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered

by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 410

STATE

v.

JOHN THOMAS AVENT CM Age 20
Student, Chidley Hall, N.C.C.

Indictment Various Cases
Trespass....., Pros.

Witnesses:

X W. K. Boger, S. H. Kress

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Lacy Carrole Streeter

SUPERIOR COURT

June Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Lacy Carrole Streeter, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand

nine hundred and 60, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its [fol. 4] manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Lacy Carrole Streeter, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 485

STATE

v.

LACY CARROLE STREETER (CM)
Age 24 222 NC College

Indictment Various Cases
Trespass....., Pros.

Witnesses:

W. K. Boger % H. S. Kress

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found X A True Bill.

G. H. Campbell, Foreman Grand Jury

INDICTMENT—Frank McGill Coleman

SUPERIOR COURT

June Criminal Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Frank McGill Coleman, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N.C., said S. H. Kress [fol. 5] and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Frank McGill Coleman, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 425

STATE

v.

FRANK McGIEL COLEMAN (WM)
Age 22 . 2219 W. Club Blvd.

Indictment Various Cases
Trespass....., Pros.

Witnesses:

W. K. Boger—S. H. Kress
A. P. Lockamy, Officer

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT— SHIRLEY MAE BROWN

SUPERIOR COURT

June Criminal Term, A. D. 1960

State of North Carolina
Durham County

The Jurors for the State upon their oath present, That Shirley Mae Brown, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land [fol. 6] and enement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guest, willfully and

unlawfully refused to do so knowing or having reason to know that he the said Shirley Mae Brown, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 418

STATE

v.

SHIRLEY MAE BROWN (CF) Age 19
Student—206 Pilot St.

Indictment Various Cases
Trespass....., Pros.

Witnesses:

X W. K. Boger—S. H. Kress

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found

X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Donovan Phillips

SUPERIOR COURT

June Criminal Term, A. D. 1960.

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Donovan Phillips, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intention-
[fol. 7] ally, after being forbidden to do so, enter upon

the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Donovan Phillips, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 472

STATE

v.

DONOVAN PHILLIPS (CM) Age 19
22 N. C. College

Indictment Various Cases
Trespass....., Pros.

Witnesses:

X W. K. Boger—S. H. Kress
T. B. Seagroves—Officer
C. J. Brown "
E. S. Batten "

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Callis Napolis Brown

SUPERIOR COURT

June Criminal Term, A. D. 1960.

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, that [fol. 8] Callis Napolis Brown, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. H. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Callis Napolis Brown, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 416

STATE

v.

CALLIS NAPOLIS BROWN (CM)
Age 21 Student 206 Pilot St.

Indictment Various Cases
__ pass_____, Pros.

Witnesses:

T. B. Seagroves—Officer
X W. K. Boger—S. H. Kress
Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Joan Harris Nelson

SUPERIOR COURT

June Criminal Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Joan Harris Nelson, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand [fol. 9] nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved

for employees and invite[d] guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Joan Harris Nelson, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation #3, infra.

No. 467

STATE

v.

JOAN HARRIS NELSON WF Age 18
Student—Southgate Dorm. Room 230—Duke Univ.

Indictment Various Cases
Trespass....., Pros.

Witnesses: X W. K. Boger—S. H. Kress
Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

EXCEPTION #1:

Defendants except to the Court's ruling in overruling [fol. 10] the following Motion to Quash the Indictments.

IN THE SUPERIOR COURT OF DURHAM COUNTY

MOTION TO QUASH INDICTMENT (Shirley Mae Brown)—and Ruling Thereon

Mr. McKissick: Now comes the defendant Shirley Mae Brown, being a Negro citizen of, Durham County and the United States of America, and herein makes the following Motion:

That the Indictment charging this defendant with simple trespass based upon G. S. 14-134 be quashed for the reason that G. S. 14-134 is hereby being unconstitutionally applied to this defendant, on the following grounds:

1. That this defendant, while using the facilities of the S. H. Kress and Company, duly licensed by the City and County of Durham for the purpose of carrying on a business open to the general public, which this defendant is a part of, was charged with trespass, while being in said public place, on account of her race and color, which criminal charge is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process of the laws as set forth in the two constitutional provisions as hereinbefore set forth.

2. And for the further reason that the S. H. Kress and Company has been duly licensed by the City and County of Durham, and said license does not grant the owner of said Company the privilege to discriminate against citizens of the City and County of Durham on account of race and color, and the State, by arresting said defendant under G. S. 14-134, further violated defendant's rights as guaranteed him under the Fourteenth Amendment to the Constitution of the United States of America, and Article I, Section 17 of the Constitution of the State of North Carolina.

[fol. 11] 3. That the provisions of North Carolina General Statutes 14-134 is unconstitutional in that it is vague and indefinite because the statute itself does not require the possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is a violation of his constitutional rights guaranteed under the due process and equal protection clause, Article I, Section 17 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

4. That the State of North Carolina, by the use of its police power, through an officer of the Durham City Police Department, in arresting this Negro defendant pursuant to North Carolina Statutes, Chapter 14, Section 134, was unconstitutional in that the arrest was a denial of due process and equal protection of the laws guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open to the public, in carrying out possessor's whims and caprices against serving members of the Negro race on the same basis as members of other races, all of whom have been invited to use said establishment, solely on the basis of race and color.

5. That this Negro defendant, who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment, was denied use of said establishment on the same basis as other members of the public, solely because of his race and color, and having been arrested by the State of North Carolina through the Durham Police Department under North Carolina G. S. 14-134 for attempting to exercise his right to equal treat-
[fol. 12] ment as an invitee of S. H. Kress and Company solely because of his race and color was a denial of due process and equal protection of the laws as guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

This 30th day of June, 1960.

Respectfully submitted,

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, W. G. Pearson, II., Counsel for Defendant.

The Court: Motion denied.
Exception: See Stipulation No. 3, infra.

EXCEPTION #1.

EXCEPTION #2:

Defendants except to the Court's ruling in overruling the following Motion to Quash the Indictments.

IN THE SUPERIOR COURT OF DURHAM COUNTY

MOTION TO QUASH INDICTMENT (Joan H. Nelson Trumpower) —and Denial Thereof

Mr. McKissick: Now comes the defendant Joan H. Nelson Trumpower, being a White citizen of Durham County and the United States of America, and herein makes the following Motion:

That the Indictment charging this defendant with simple trespass based on G. S. 14-134 be quashed for the reason that G. S. 14-134 is hereby being unconstitutionally applied to this defendant on the following grounds:

1. That this defendant, while using the facilities of the S. H. Kress and Company, duly licensed by the City and County of Durham and the State of North Carolina for the purpose of carrying on a business open to the general public, which this defendant is a part of, was charged with trespass, while being in said public place, on account of [fol. 13] her association with members of the Negro race, which criminal charge is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process of the laws as set forth in the two constitutional provisions as hereinbefore set forth.

2. And for the further reason that the S. H. Kress and Company has been duly licensed by the City and County of Durham, and said license does not grant the owner of said Company the privilege of discriminating against white citizens of the City and County of Durham on account of association with Negroes, and the State, by arresting said white defendant under G. S. 14-134, further violated defendant's right as guaranteed her under the Fourteenth Amendment to the Constitution of the United States of

America and Article I, Section 17 of the Constitution of the State of North Carolina.

3. That the provisions of North Carolina General Statutes 14-134 is unconstitutional in that it is vague and indefinite, because the statute itself does not require the possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his or her liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is a violation of his constitutional rights guaranteed under the due process and equal protection clause, Article I, Section 19 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the United States Constitution.

4. That the State of North Carolina, by the use of its police power, through an officer of the Durham County Police Department, in arresting this white defendant, who [fol. 14] was associating with Negroes, pursuant to North Carolina General Statutes, Chapter 14, Section 134, was unconstitutional in that the arrest was a denial of due process and equal protection of the laws guaranteed by Article I, Section 17 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open to the public, in carrying out possessor's whims and caprices against serving members of the white race who associated with Negroes on the same basis as members of other races, all of whom have been invited to use said establishment, solely on the basis of the fact that they were associating with Negroes.

5. That this white defendant who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment were denied use of said establishment on the same basis as other members of the public, solely because she was associated with Negroes and having been arrested by the State of North Carolina through the Durham County Police Department under

North Carolina G. S. 14-134 for attempting to exercise her rights to equal treatment as invitee of S. H. Kress and Company solely because she was associating with Negroes, a denial of due process and equal protection of the laws as guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

This the 30th day of June, 1960.

Respectfully submitted,

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, W. G. Pearson, II.

Court: Motion denied.
Exception: See Stipulation No. 4, infra.

EXCEPTION #2.

[fol. 15]

IN THE SUPERIOR COURT OF DURHAM COUNTY

PLEA, JURY AND VERDICT

John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Donovan Phillips, and Lacy Carrole Streeter, by and through their attorneys F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson, enter a plea of Not Guilty in each case. The cases were consolidated for the purpose of trial.

These cases were called at the June 27, 1960, Term for the purpose of trial and the defendants pleaded Not Guilty as charged in the Bills of Indictment, and thereupon a Jury was properly sworn and impaneled.

On the first day of July, 1960, the Jury heretofore chosen, sworn and impaneled and sitting together in this case to hear the evidence of the State and the evidence of the defendants, argument of counsel, and the charge of the Court, and said for its verdict that the defendants John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown,

Frank McGill Coleman, Joan Harris Nelson Donovan Phillips, and Lacy Carrole Streeter, and each of them, are Guilty as charged.

IN THE SUPERIOR COURT OF DURHAM COUNTY

JUDGMENT AND APPEAL ENTRIES

The Court: Case No. 410, John Thomas Avent. Are you one of the leaders?

John Thomas Avent: I don't know what you mean by leader.

The Court: Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a period of fifteen (15) days.

Defendant gives notice of appeal to the Supreme Court of North Carolina. Notice of appeal given in open court. Further notice waived. Appearance bond fixed at $300.00. [fol. 16] Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 418, Shirley Mae Brown. Are you one of the fourteen leaders?

Shirley Mae Brown: I am one of the followers.

The Court: You are one of the followers. Judgment of the Court is that the Prayer for Judgment be continued for a period of two years.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $300.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 425, Frank McGill Coleman. Are you one of the leaders?

Frank McGill Coleman: Yes, that's true.

The Court: That's true. What's true?

Frank McGill Coleman: That I am one of the leaders.

The Court: You have been connected with all this disturbance down the street since February 8th of this year?

Frank McGill Coleman: If you describe it in that manner. Yes, sir, I have been connected.

The Court: Well, whatever it is, that has been going on down the street in the second block from here to my left?

Frank McGill Coleman: Yes, sir.

The Court: Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a term of thirty (30) days to be assigned to work under the supervision of the State Prison Department.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $500.00. Appeal bond for cost is [fol. 17] fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 416, Callis Napolis Brown. I believe you said you were one of the leaders?

Callis Napolis Brown: Yes, sir.

The Court: And you have been connected with all this disturbance or whatever has been going on in the second block to my left since February 8th?

Callis Napolis Brown: If that's the way you want to put it.

The Court: Well, is there any other way you want to put it?

Callis Napolis Brown: Yes, sir.

The Court: How do you want to put it?

Callis Napolis Brown: It is not a disturbance.

The Court: Judgment of the Court is the defendant be imprisoned in the common jail of Durham County for a term of thirty (30) days to be assigned to work under the supervision of the State Prison Department.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $500.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 467, Joan Harris Nelson. Are you one of the leaders?

Joan Harris Nelson: No, sir.

The Court: What?

Joan Harris Nelson: No. I am not one of the leaders.

The Court: Prayer for judgment continued for a period of two years.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. [fol. 18] Appearance bond fixed at $300.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 472, Donovan Phillips. Donovan, are you one of the leaders?

Donovan Phillips: Yes, sir.

The Court: Sir?

Donovan Phillips: Yes, sir.

The Court: Are you bragging or just . . .

Donovan Phillips: No, sir.

The Court: Are you one of the same kind of leaders as Coleman and Brown?

Donovan Phillips: Yes, sir.

The Court: Equal authority with them for the disturbance that's been going on up there?

Donovan Phillips: Yes, sir.

The Court: You were in this conspiracy or plan or agreement the night before to go and do these things?

Donovan Phillips: Yes, sir.

The Court: You were one of the leaders in the thing?

Donovan Phillips: Yes, sir.

The Court: Your name is Donovan Phillips?

Donovan Phillips: Donovan Phillips.

The Court: Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a term of thirty (30) days to be assigned to work under the supervision of the State Prison Department.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $500.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the prepara-

tion of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 485, Lacy Carrole Streeter. Are you one of the leaders?

Lacy Carrole Streeter: Yes, sir.

[fol. 19] The Court: You boys are different from Avent; you have different authority in this group than Avent did, didn't you? . . . Are you one of the fourteen leaders in this group?

Lacy Carrole Streeter: Yes, sir.

The Court: Are you one of them that went back and got arrested again as soon as you were released down here?

Lacy Carrole Streeter: I have only been arrested once.

The Court: One time . . . And you have been arrested twice, haven't you? (As to Donovan Phillips)

Donovan Phillips: Yes, sir.

The Court: And Brown, you have been arrested twice?

Callis Napolis Brown: Yes, sir.

The Court: And Coleman, you have been arrested twice?

Frank McGill Coleman: No, sir.

The Court: You have only been arrested once?

Frank McGill Coleman: Yes, sir.

The Court: And Streeter, you say, your participation and your part of all of this, that that you have been in, has been equal to Brown's and the other two gentlemen, but superior to that of Avent?

Lacy Carrole Streeter: No. It's been equal to Brown's and Phillips'.

The Court: But superior to that of Avent?

Lacy Carrole Streeter: I believe so.

The Court: Those who lead have the greater responsibility and the greater punishment. However, you have only been arrested one time.

Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a term of twenty (20) days.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $350.00. Appeal bond for cost

is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

[fol. 20]

IN THE SUPERIOR COURT OF DURHAM COUNTY

Statement of Case on Appeal

This is a criminal trial on bills of indictment charging the defendants with entering and trespassing upon the land of another, without license, having been forbidden to do so. The cases have been consolidated for trial; said bills of indictment appearing in the record proper. The cases were tried June 30, and July 1, 1960, before his Honor Raymond B. Mallard, the Judge presiding at the Criminal Term of Superior Court of Durham County, North Carolina, and the Jury, and the following proceedings were had.

The following witnesses, being duly sworn, testified as follows:

STATE'S EVIDENCE

W. K. BOGER:

Direct examination.

By Mr. Murdock:

I live in Durham. I am the manager of the local store operated by S. H. Kress & Company. We have but one store in Durham. The store is located on the corner of Main and Mangum Sts. The address is 101-103 West Main Street. On May 6, 1960, I was the manager of this store. There was no other official, agent or officer of the company over me in Durham. I had complete control and all of the authority over this store and the property of S. H. Kress here in Durham; property located at 101-103 West Main Street belongs to S. H. Kress & Company.

I was in the store on May 6, 1960, and the defendants John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Dono-

van Phillips, and Lacy Carrole Streeter were also in the store on that date. They were in the vicinity of the luncheonette department. That department is located in the rear of the basement on the basement floor. We have two selling floors and three stockroom floors. In all, there are [fol. 21] five floors in the building. On May 6, 1960, the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees. We had signs posted over that department stating that the department was being operated for employees and guests only. We had iron railings separating this department from other departments in the store. There were chained entrances on that date.

On May 6, 1960, these seven defendants were in our store. I had conversations with every one of them. I very nicely stated that the department was open for employees and invited guests, and I said to them that I am sorry, I am going to have to ask you to leave. Before they were seated at the lunch department, I asked them not to be seated, and when they were seated, I asked them to leave the premises. They refused to leave until they were served. I called an officer of the City Police Department. The officer asked them to leave and they still would not leave, so he arrested them and charged them with trespassing, and that is the charge upon which they are being tried today. At that time, I was the manager and in charge of the property of the Kress Company, and, under the circumstances, I did not want them on the premises. Five of these defendants are Negro, and two of the defendants are white.

Cross examination.

By Mr. C. O. Pearson:

Mr. Boger: I spell my name B-o-g-e-r. I have worked for the Kress Company thirty years. Before coming to Durham, I worked in Jacksonville, Florida. When I came to Durham, these sit-down demonstrations were in progress. The fountain was closed when I came to Durham, but I did not come here for the purpose of opening up the foun-

tain. I had a conversation with these defendants, both white and Negro, and I spoke to them in a nice manner and they spoke to me in a nice manner. There was no ill feeling on my part, and there was no ill feeling on their [fol. 22] part. There was a little loud talking on the part of the defendants, but, generally, they were orderly and quiet.

Kress Company operates stores all over the country. It is the policy of our store to wait on customers dependent upon the customs of the community. The object of operating our store is definitely to make a profit. We have a stand-up counter on the first floor, and we serve Negroes and whites at that stand-up counter. We also serve white people who are accompanied by Negroes at that stand-up counter. We did not have a sign over our entrances which said in effect that Kress Company does not solicit the patronage of Negro people. That has never been necessary. Up until that time it was not necessary to forbid any Negroes from coming into our store. I don't know exactly how many counters we have in the store, but I could give you a rough estimate. It is the policy of our store to operate all counters in the interest of the customs of the community. I think we have 50 counters in the store. It it the policy of Kress to accept patronage of Negroes at those 50 counters. It is also the policy of Kress to accept the patronage of white people accompanied by Negroes at those fifty counters.

In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangement. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter. Even if Negroes accompanied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 6, 1960. We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson, I do not consider you as an invited guest, under the circumstances right now. I do consider Mr. Murdock an invited guest under the circumstances. White people are considered guests. White people accompanied by Negroes are not considered

[fol. 23] guests. Our employees did not have that right to invite guests to our luncheonette. I was the person who invited the guests. I did not send out invitations. It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only."

Had these two young people (indicating the white defendants) come into the store on that date alone, under the circumstances I would not have served them. Had they come into the store on May 4, 1960, I would not have served them for the reason that they made every effort to boycott my store. I first came to Durham on March 21. I do not know all of the white people in Durham, and I do not know all the white people at Duke University. I have seen these people before May 6, 1960. I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave. There are two entrances to my store on Main Street. I have never put up a sign over either one of those entrances to the effect that they would read "For Colored People or for White People."

There were no police in the store at the time these defendants came in. I did not seek police protection.

Redirect examination.

By Mr. Murdock:

These seven defendants were not employees of our store on May 6, 1960. They did not have any authority or permission to be in that part of the store that I asked them to leave. It was the conduct of the defendant Joan Harris Nelson, the white girl, that made me ask her to leave.

Recross examination.

By Mr. C. O. Pearson:

I asked her to leave because she gave her food to a Negro. I told her that I would be glad to give her a refund for what she paid for the food. And I told her if she

[fol. 24] wanted to feed this person, if she was hungry, I could make arrangements for her to go back and feed her, but I did not want a disturbance caused at my lunch department, and she refused to do so; therefore, I had to ask her to leave.

Redirect examination.

By Mr. Murdock:

I have been with the S. H. Kress Company for thirty years. I was assistant manager in the Durham store for three years; 1937, 1938, and 1939. I ran my first store in Oklahoma.

CAPT. CANNADY:

Direct examination.

By Mr. Murdock:

I am Capt. Cannady of the Durham Police Department, and I was Captain on May 6, 1960. As a result of a call to our Department, I went to S. H. Kress and Company. I saw these seven defendants, that is six of them, with the exception of Mr. Coleman. They were seated at the lunch counter at S. H. Kress. I heard Mr. Boger ask each of these defendants to leave and they refused to do so. I then advised them that they could either leave or they would be arrested for trespassing. They refused to leave and as a result I charged them with trespassing.

Exception #3: Defendants except to the Court's ruling on the following:

Q. You know that Mr. Boger was the manager of the store?

A. Yes, sir.

Q. And they knew that he was and had been so told by you and by him?

A. Yes, sir.

Q. That he was manager and in charge?

A. Yes, sir.

Mr. Marsh: I object. I can't hear the questions and I can't hear the answers.

Court: Speak a little louder then, Mr. Solicitor and Mr. Witness.

Mr. Marsh: I want her to read back the last question that Mr. Murdock asked.

[fol. 25] Court: Read them to him, Miss Nelda.

Reporter: "Q. You knew that Mr. Boger was the manager of the Store?

A. Yes, sir.

Q. And they knew that he was and had been so told by you and by him?"

Mr. Marsh: Now, that I object to as leading the witness.

Court: The objection comes too late. Put in this. The objection comes after the witness has answered the question and it comes too late.

Mr. Marsh: I couldn't hear the question, may it please the Court.

Court: Well, there are five others sitting there and there was no objection made.

Mr. Marsh: Motion to strike the answer relative to the last question asked by Mr. Murdock.

Motion denied—Exception #3.

Cross examination.

By Mr. Marsh:

Capt. Cannady: I asked six of these defendants to leave, and Mr. Boger asked them to leave in my presence. I have been a member of the Durham Police Department for ten years. We make an arrest when an offense is committed in our presence. After Mr. Boger asked these defendants to leave, in my presence, and they refused to leave, that constituted trespassing. He did not sign the warrants after the arrest. I did not have a warrant with me when we made the arrest. Mr. Boger did not sign the warrant before we arrested them.

Capt. Seagroves and I went to the store, that is Kress' store, after we received the call from the radio operator that Mr. Boger stated that there was a disturbance at the

store. When we arrived, we found Mr. Brown seated at the lunch counter. At that time, he was the only one there. We arrested Mr. Brown and started back to the station, but before we could get back to the street, someone hollered, "You had better go back." So I went back downstairs, and it appeared that there were 30 or 40 seated there. After Mr. Boger told these defendants to leave, I arrested them [fol. 26] for trespassing. Capt. Seagroves and I were the only officers to begin with. However, I called for another car, and two officers came in that car. The only reason for the arrest is that I felt that they were trespassing. Otherwise, their conduct and deportment was very good.

Redirect examination.

By Mr. Murdock:

The only crime committed in my presence, as I saw, it was their failure and refusal to leave when they were ordered to do so by the manager.

IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #4:

MOTION FOR DISMISSAL AS OF NONSUIT AND DENIAL THEREOF

Mr. McKissick: Now comes the defendant, through his or her attorneys, and moves the Court to dismiss this action as of nonsuit for the following reasons:

I. That the evidence shows that the defendant is a citizen of the State of North Carolina and of the United States, and entered S. H. Kress and Company for the purpose of shopping and using the facilities of said Store as are normally used by persons of the white race; that the defendant was arrested for trespass and when said defendant took a seat and requested service at the lunch counter of the S. H. Kress and Company Store; that said defendant had purchased other articles in said Store and had entered upon the premises lawfully and in an orderly manner; that said defendant had been trading at said store for a long period of time prior to said arrest.

II. That this action should be nonsuited in that the Court lacks jurisdiction as required under the Fourteenth Amendment to the United States Constitution to enforce G. S. 14-134 (Trespass), as here sought to be applied, in that the enforcement of G. S. 14-134 constitutes, (a) an arrest by the Police Department, which action, being a State action, [fol. 27] is in violation of this defendant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

III. That the enforcement of the Trespass Law, G. S. 14-134, under the circumstances as presented by the evidence in this case, to wit: The defendant, after being invited on the premises of S. H. Kress and Company generally, as alleged in the indictment herein, this defendant is charged is violative of defendant's constitutional rights, (a) under the privilege and immunities clause; (b) equal protection of the law clause; and (c) the due process clause of the Fourteenth Amendment to the United States Constitution.

IV. That the S. H. Kress and Company is operating its lunch counter pursuant to the authority granted by North Carolina General Statutes 72-46, and therefore cannot deny service to this defendant because of his race and color, as said statute has no standard based upon race. That by refusing to serve this defendant, said Store has violated the defendant's rights to the equal protection of laws clause, and the due process clause of the Fourteenth Amendment to the United States Constitution in denying this defendant service; that the refusal to serve this defendant is in violation of his rights under the Civil Rights Act of 1866: "All citizens of the United States shall have the same right, in every State and territory, as in enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property," and that the refusal to serve this defendant is violative of the valuable property right existing in and belonging to said defendant.

V. That this defendant, while using the facilities of the S. H. Kress and Company duly licensed by the City of Durham and County of Durham for the purpose of carry-

ing on a business open to the general public, which this defendant is a part of, was charged with trespass, while [fol. 28] being in said public place, on account of his race and color, which criminal charge is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process (clauses) of the laws as set forth in the two constitutional provisions as hereinbefore set forth.

VI. That for the further reason that the S. H. Kress and Company has been duly licensed by the City of Durham, County of Durham, and said license does not grant the owner of said Company the privilege of discriminating against citizens of the City of Durham, and the County of Durham, on account of race and color, and the State, by arresting said defendant under G. S. 14-134, further violated defendant's right as guaranteed him under the Fourteenth Amendment to the Constitution of the United States of America, and Article I, Section 17 of the Constitution of the State of North Carolina.

VII. That the provisions of North Carolina General Statutes, 14-134 is unconstitutional in that it is vague and indefinite because the statute itself does not require the possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is in violation of his constitutional rights guaranteed under the due process and equal protection clause, Article I, Section 17 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the United States Constitution.

VIII. That the State of North Carolina, by the use of its police power, through an officer of the Durham City [fol. 29] Police Department, in arresting this Negro defendant pursuant to North Carolina General Statutes, Chapter 14, Section 134, was unconstitutional in that the

arrest was denial of due process and equal protection of the laws guaranteed by Article I; Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open to the public, in carrying out possessor's whims and caprices against serving members of the Negro race on the same basis as members of other races, all of whom have been invited to use said establishment, solely on the basis of race and color.

IX. That this Negro defendant, who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment, was denied use of said establishment on the same basis as other members of the public, solely because of their race and color and having been arrested by the State of North Carolina through the Durham City Police Department under North Carolina G. S. 14-134 for attempting to exercise his right to equal treatment as invitee of S. H. Kress and Company solely because of his race and color was a denial of due process and equal protection of the laws as guaranteed him by Article I, Section 17, of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

X. That the warrant is fatally defective in that it fails to allege sufficient possession in W. K. Boger and that it fails to identify W. K. Boger as being the person with the authority to evict this defendant.

This 30th day of June, 1960.

Respectfully submitted:

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr.,
[fol. 30] L. C. Berry, Jr., M. Hugh Thompson,
W. G. Pearson, II., Counsel for Defendant.

The Court: Motion denied.
Exception: See Stipulation No. 5, infra.

Exception #4.

IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #5:

MOTION FOR DISMISSAL AS OF NONSUIT AND DENIAL THEREOF

Mr. McKissick: Now comes the defendant, through his or her attorneys, and moves the Court to dismiss this action as of nonsuit for the following reasons:

I. That the evidence shows that the defendant is a citizen of the State of North Carolina and of the United States, and entered S. H. Kress and Company for the purpose of shopping and using the facilities of said store as are normally used by persons of the white race; that the defendant was arrested for trespass when said defendant took a seat and requested service at the lunch counter of the S. H. Kress and Company Store; that said defendant had purchased other articles in said store and had entered upon the premises lawfully and in an orderly manner; that said defendant has been trading at said Store for a long period of time prior to said arrest.

II. That this action should be nonsuited in that the Court lacks jurisdiction as required under the Fourteenth Amendment to the United States Constitution to enforce G. S. 14-134 (Trespass), as here sought to be applied, in that the enforcement of G. S. 14-134 constitutes, (a) an arrest by the Police Department, which action, being a State action, is in violation of this defendant's rights as guaranteed by the Fourteenth Amendment of the United States Constitution.

[fol. 31] III. That the enforcement of the Trespass Law, G. S. 14-134, under the circumstances as presented by the evidence in this case, to wit: The defendant, after being invited on the premises of S. H. Kress and Company generally, as alleged in the indictment herein, this defendant is charged in violation of defendant's constitutional rights, (a) under the privilege and immunities clause; (b) equal protection of the law clause; and (c) the due process clause of the Fourteenth Amendment of the United States Constitution.

IV. That the S. H. Kress Company is operating its lunch counter pursuant to the authority granted by North Carolina General Statutes 72-46, and therefore cannot deny service to this defendant because of his or her association with members of the Negro race on attempting to use the eating facilities of S. H. Kress and Company in Durham, North Carolina; that by refusing to serve this defendant, said Store has violated the defendant's rights to the equal protection of laws clause, and the due process clause of the Fourteenth Amendment to the United States Constitution.

V. That this defendant, while using the facilities of the S. H. Kress and Company duly licensed by the City of Durham and the County of Durham for the purpose of carrying on a business open to the general public, which this defendant is a part, was charged with trespass, while being in said public place, on account of his or her association with members of the Negro race, is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process laws as set forth in the two constitutional provisions as hereinbefore set forth.

VI. That for the further reason that the S. H. Kress and Company has been duly licensed by the City of Durham, [fol. 32] County of Durham, and said license does not grant the owner of said Company the privilege of discriminating against citizens of the City of Durham, and the County of Durham, on account of race and color, and the State, by arresting said defendant under G. S. 14-134 for his or her association with Negroes in attempting to eat on the premises of S. H. Kress and Company further violated defendant's rights as guaranteed him, her, under the Fourteenth Amendment to the Constitution of the United States of America, and Article I, Section 17 of the Constitution of the State of North Carolina.

VII. That the provisions of North Carolina General Statutes 14-134 is unconstitutional in that it is vague and indefinite because the statute itself does not require the

possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is in violation of his constitutional rights guaranteed under the due process and equal protection clauses, Article I, Section 17, of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

VIII. That the State of North Carolina, by the use of its police power, through an officer of the Durham County Police Department, in arresting this white defendant pursuant to North Carolina General Statutes, Chapter 14, Section 134, was unconstitutional in that the arrest was denial of due process and equal protection of the laws guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open [fol. 33] to the public, in carrying out possessor's whims and caprices against serving members of the Negro race or members of the white race associated with them, all of whom have been invited to use said establishment, solely on the basis of race and color.

IX. That this white defendant, who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment, was denied use of said establishment, on the same basis of other members of the public, solely because of his or her association with members of the Negro race and, having been arrested by the State of North Carolina through the Durham City Police Department under North Carolina G. S. 14-134 for attempting to exercise his or her right to equal treatment as invitee of S. H. Kress and Company solely because of his or her association with members of the Negro race was a denial of due process and equal protection of the laws as guaranteed him of her by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

X. That the indictment is fatally defective in that it fails to allege sufficient possession with W. K. Boger and that it fails to identify W. K. Boger as being the person with the authority to evict this defendant.

This 30th day of June, 1960.

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, W. G. Pearson, II., Counsel for Defendants.

The Court: Motion denied.
Exception: See Stipulation No. 6, infra.

Exception #5.

[fol. 34]

IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #6.

ADDITIONAL MOTIONS FOR DISMISSAL AS OF NONSUIT AND DENIAL THEREOF

Mr. McKissick: The indictment charging the defendant, a Negro, with the violation of G. S. 14-134, to wit, an alleged trespass upon the land after having been forbidden to enter is invalid in that the evidence establishes merely that the defendant was peacefully upon the premises of S. H. Kress and Company, an establishment performing an economic function invested with the public interest as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the indictment other than an effort to exclude the defendant from S. H. Kress and Company because of his race or color. Defendant at the same time is excluded from equal service that the preponderant number of other eating establishments in the City of Durham, thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the Fourteenth Amendment to the United States Constitution.

The Court: Motion denied.
Exception: See Stipulations 5 and 6, infra.
Exception #6.

Exception #7:

Mr. McKissick: That the evidence offered against the defendants in support of the indictment charging him with trespass establishes that they were at the time of the arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in S. H. Kress and Company, an establishment performing an economic function invested with the public interest. That defendants peacefully were attempting to obtain services at the facilities of the S. H. Kress and Company in the manner which other white persons similarly situated do. And at no time were the defendants defiant or in breach of the [fol. 35] peace, and was at all times upon an area essentially public. Wherefore, defendants have been denied rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The Court: Motion denied.

Exception: See Stipulations 5 and 6, infra.

Exception #7.

Exception #8.

Mr. McKissick: The evidence established that the prosecution of the defendants was procured for the purpose of preventing them from engaging in peacefully assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in the City of Durham to permit the defendants and other members of defendants' race from enjoying the access to certain stores, facilities and accommodations afforded members of other races, and that by this prosecution prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce racially discriminatory policies contrary to the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Court: Motion denied.

Exception: See Stipulations 5 and 6, infra.

Exception #8.

IN THE SUPERIOR COURT OF DURHAM COUNTY

DEFENDANTS' EVIDENCE

LACY CARROLE STREETER:

Direct examination.

By Mr. McKissick:

I am Lacy Carrole Streeter, age 24, address Box 2727, North Carolina College. My permanent address is 1401 West Third Street, Greenville, North Carolina. I am a member of the Negro race. I am a senior at North Carolina College. I was in S. H. Kress store on May 6, 1960. On [fol. 36] that date, I went into the store at the first level and made a purchase at the paper counter. After making the purchase, I went down to the lunch counter and took a seat there, and later I was asked to leave the lunch counter before receiving service. I have been in Kress Store on many occasions prior to May 6, 1960. I stopped at the upstairs counter of Kress and I can identify the item that I purchased there. The item was a note pad, which on the counter with school supplies and office supplies. I received a receipt with my purchase.

(Note pad was introduced as Defendants' Exhibit A without objection.)

After I made my purchase, I came back toward the front entrance and went downstairs to the basement. I went to the lunch counter, took a seat and waited to have my order accepted by the waitress. The waitress never accepted my order. She never approached me. No one ever asked me what I was going to purchase. As I was sitting at the lunch counter, Mr. Boger said something to the other defendants there, and the officers accompanying him would direct them to the door near the rear of the counter. No one ever said anything to me. I continued to sit at the counter awaiting the waitress to take my order.

After Mr. Boger spoke to several of the other students there, the police officer approached me and then directed me toward the rear of the lunch counter, and I assumed I

was being placed under arrest. No one ever asked me to leave the lunch counter, neither Mr. Boger nor Capt. Cannady asked me to leave. The officer made no verbal request for me to leave. He just directed me toward the rear of the lunch counter. He did not tell me why he wanted me to move over there with the other students.

Cross examination.

By Mr. Murdock:

I have been at North Carolina College for three years, and my senior year is coming up. I have been here since [fol. 37] 1958. I have been in Kress' on other occasions, maybe sometimes once every two weeks, sometimes once a week. I had the occasion to go to Kress' between February, 1960, and May 6, 1960. The purpose was to request service at the lunch counter. I recall that I requested service at the lunch counter on February 8, 1960. I remember that occasion, but I don't recall any one other than that. The lunch counter was closed for a long period of time.

I had no other occasion to go into the store during that period other than for the purpose of seeking service at the lunch counter. I am not familiar with any boycott of the store. I was familiar with the people who were walking in front of the store with signs on them. There were numerous signs that they were carrying, but I don't recall any specific one. The purpose of doing that was to promote or to encourage the service of Negroes at the lunch counter. That was the basic purpose of the movement. The purpose of carrying these signs was to encourage people to shop at the store if they could receive service at all of the counters in the store. We were encouraging people to shop at the store if they could receive service in the store.

We had been refused service at the lunch counter earlier this year. There was more than one occasion. I did not know that I was not welcome at the lunch counter. I knew that I had not received service there on prior attempts. I continued to try to get service there. There were no attempts made to stop me from entering the door. No one objected to my entering. I had not been informed that there had been any change in the policy of the Company

from February up to May 6. My purpose for carrying the signs was to encourage people to be received in all sections of the store. I bought these pads because I needed them, and, secondly, to see if my services or my patronage would be accepted on the first floor. I have never been refused [fol. 38] service on the first floor. I have never been refused service in any part of the store except the lunch counter. I use them for scratch pads. I bought them to see if my patronage would be accepted. We had decided, that is the students who were taking part in the movement, that we would make a purchase. There had been a general agreement reached by these students participating to the effect that we would make a purchase to see if our patronage would be accepted on the first floor.

We have counsel. I have consulted counsel about these matters. I had not consulted counsel on the specific point of making a purchase. I have consulted with counsel prior to making my decision of going to the lunch counter. It was not on the advice of counsel that I did this. I walked through the normal passageway to get to the lunch counter. There was no chain across it. There were others with me at the time I entered. I do not recall the exact number. There were five or six who accompanied me. There were some students already seated there when I arrived. These students agreed to make a purchase before attempting to gain service at the lunch counter. There were approximately 35 or 40. The 35 or 40 went to the lunch counter within a margin of 35 or 40 minutes. I don't recall that any of them went under the rail to get in.

I didn't know at the time whether or not I would be arrested for trespassing. I did not want to be arrested for trespassing. I didn't think that I would be arrested for trespassing. When I entered the door upstairs I wasn't arrested, and I didn't think that I would be arrested downstairs. I went there for service. I expected to be served. I had tried on other occasions to be served, but I was refused service. However, I continued to try, and I did not know whether or not I would be served. A police officer directed me toward an assembly of students. I was never ordered to leave or requested to leave by the manager or [fol. 39] any other person in charge of the store. I learned

that I had been charged with trespassing at the Police Station. I asked if I was under arrest, and I asked the officer if he knew what we were being charged with, and he said he thinks it would be trespassing. Officer Spangler told us this while we were in the store. I had enough money on my person to buy more than a glass of water. I don't recall how much money I had in my pocket at that time. I had as much as fifty cents.

I don't know whether any arrangements had been made for bond for me in the event that I was arrested. I made no arrangements for bond. I left the matter of a bond to my attorneys. I employed my attorneys in February. I started consulting with my attorneys in February. I kept them retained until May 6, 1960. I did not know whether or not I would be arrested. There was a possibility, though, of my arrest. However, I did not want to be arrested. I was going to request service at the lunch counter, and I employed counsel in case there was a possibility of an arrest. I didn't expect to do anything to violate the law.

I was not requested to leave by the management. I intended to stay there until I was served, as long as I was orderly. There was a possibility, I felt, that I would be arrested, even after having been requested to leave if I stayed. That was one of the reasons I retained counsel. I took the pads that I bought back to the student meeting after having been released from jail. At the student meeting, we decided to keep the pads for the purpose that we have used them here today. I was in jail when some of the others were arrested, and I don't know whether all of the students made a purchase on that date. But whatever we purchased we decided in the meeting after the arrests that we would keep the purchase to be used in evidence. We were never instructed to do this. We had never been advised to do this. But we decided to do this after discussing the matter with the group.

[fol. 40] Redirect examination.

By Mr. McKissick:

I felt I had a right to seek service at the lunch counter in Kress' when I went there and after having been served

on the first floor, I felt that I had a right to receive service at the lunch counter.

Recross examination.

By Mr. Murdock:

I have not been instructed that the law does not give me the right to seek service there; moreover, I have not been instructed that if I had been refused service and requested to leave and refused to leave, that I would be violating the law. I left when the officer directed me to leave. I had no intentions of remaining after having been instructed to leave by the officer.

DONOVAN PHILLIPS:

Direct examination.

By Mr. McKissick:

I live at 1109 Fayetteville Street, but my permanent address is 1309 West Fourth Street, Greenville, North Carolina. I am 19 years of age. I attend school at North Carolina College. My classification is senior. I know where S. H. Kress is located. It is located on the corner of Mangum and Main Streets. There is a very large sign indicating that this is Kress' Store. The sign is about 50 feet wide and 8 feet high. There are two entrances to the S. H. Kress Store, and these entrances are located on Main Street. There is no sign over either of these entrances saying, "For White Only." There is no sign saying "For Colored Only." I was in S. H. Kress Store on May 6, 1960. I was not stopped by anyone when I went into this store. When I went into the store, I went to the counter that sold paper and school supplies. The counter is about three or four counters down in the store. When I went to the school supplies counter, I purchased a pad of lineless paper. I received a receipt for my purchase.

[fol. 41] (At this point the lineless paper was introduced into evidence, without objection, as Defendants' Exhibit B.)

After I made this purchase, I went downstairs to the lunch counter, located in the basement of the store. When I got on the basement floor, no one ordered me out. No one ordered me out of the store until I got to the lunch counter. When I took a seat at the lunch counter, I was approached by Mr. W. K. Boger, who said, "You are not an invited guest, and you are not an employee; so I am asking you to leave." Before I could ask him who he was, the police officer directed me to the back of the store. The police officer was Capt. Seagroves. Mr. Boger said nothing more to me than I have already stated. Capt. Seagroves just said, "Get up," and he pointed to the back of the store. After I was arrested, we were taken up the back steps of Kress' and out the back, and we walked to the jail. They fingerprinted us after we had been put in the cells.

No one read a warrant to me in Kress' Store. The warrant was read to me while I was being fingerprinted at the Police Station. I had been in Kress' Store approximately once in two weeks or had just dropped in and picked up an occasional article prior to May 6, 1960. There is a stand-up lunch counter upstairs, and I have been served along with white people. I have never been refused service at the stand-up lunch counter upstairs, and I have never been ordered to leave the store while frequenting the upstairs lunch counter. I was a regular customer at Kress' prior to February 8, 1960. I am a member of the Negro race.

Cross examination.

By Mr. Murdock:

I was a customer at Kress' prior to February 8, 1960, but I have discontinued my patronage of this store. We were encouraging the patronage of this store if all Negroes could be served at all counters in the store. Otherwise, we were not to patronize the store. I bought the notebook [fol. 42] paper because it was the decision of the group at a meeting held previously to make a purchase before we went downstairs to try to obtain service. I expected

to be served at the lunch counter. I did not expect to be ordered out. I did not expect to be arrested. I didn't get a chance to leave when Mr. Boger asked me to leave because I was directed to the back of the store by Capt. Seagroves. Had I been given an opportunity to leave, I don't know whether or not I would have left. If the police officer had directed me to leave the store, I would have left. I would have left at the request of the manager, if he had identified himself. I didn't get a chance to ask him who he was.

I marched in the picket line carrying signs. I don't know what was on the sign. I carried several of them. I remember on one of the signs that this language appeared: "Segregation is the Negro's Burden and America's Shame," by M. L. King. I remember another one which said, "It's Spring, Let Democracy Flower." At the moment, I don't recall any others.

Redirect examination.

By Mr. McKissick:

At the time I went into S. H. Kress I believe I had a constitutional right to be served at that lunch counter.

JOAN HARRIS NELSON TRUMPOWER:

Direct examination.

By Mr. McKissick:

My name is Joan Harris Trumpower. My Washington address is c/o Rev. D. R. Diamond, New Men's Dormitory, Howard University; and here it is c/o Rev. Charles Johnson, Presbyterian Chaplain, Duke University. On May 6, 1960, I was a freshman at Duke University. On this date I went into S. H. Kress Company alone. When I went into the store, I walked around and looked at the various counters. There were several things I thought I might like to [fol. 43] buy. I went over and bought a ball point pen, as I needed one. (At this point the ball point pen was in-

troduced into evidence, without objection, as Defendants' Exhibit C.)

I have patronized Kress' prior to the date that I was arrested. I imagine that I have visited this store about half a dozen times. I have visited this store with another young lady, who is white, but on this occasion I went alone. After I made my purchase at the stationery counter, I went downstairs to the lunch counter. When I got to the lunch counter, a waitress asked me for my order. She brought me food, and I was eating it. The lunch counter was almost full of customers. There were no Negroes there at that time. This man (indicating Mr. Boger) came up to me as I was eating there and said that I was not invited, and I said to him that I spent my money upstairs in this store and that I could not understand how he determined that I was not a guest; and he said that I was antagonizing the customers, and then a police officer came, and I asked him if I was being arrested, and he said, "Let's go." While I was there, I ran into several students from Duke, and they left, but I had not finished.

Several students from North Carolina College came in and sat on either side of me. I talked to those students at that time, and I offered to buy some of them some food. When I offered them food, some of them were taken off by the officers, and it was not right away that the manager or police officer came up to me. Mr. Boger had the others arrested before he got to me. When he got to me, he said that I was not invited and that I would have to leave because I was antagonizing the customers. I did not leave at first because I wanted to know why, and while we were in the process of discussing this, the police officer told me, "Let's go." He did not offer to give me my money back and no mention was made of any money. He did not tell me that he was the manager of the S. H. Kress Company. [fol. 44] He did not say that he was one of the employees of the store. He was completely unidentified to me. The officer said, "Let's go." When I saw the way he was pointing, I walked back to the rear of the store. I am a member of the white race. I have not eaten at Kress' lunch counter prior to this time.

Cross examination.

By Mr. Murdock:

On May 6, 1960, I was a student at Duke University. I had not been attending these meetings with the students at North Carolina College in regard to the sit-ins. I have attended some since then—since May 6, 1960, I met some of the students at North Carolina College through some friends at Duke University who knew them. I had not met with them prior to May 6, 1960. I have been in the picket lines carrying signs in front of S. H. Kress Store. I had been interested in this movement when I first read of its happening in Greensboro. I did not participate in the Greensboro movement. I was in the picket line here about three times prior to May 6, 1960.

I was not instructed or advised to make a purchase in some other part of the store before going to the lunch counter. I purchased a ball point pen as I needed it. I was in the process of having a conversation with Mr. Boger during which he requested that I leave. I did not want to be arrested on that day. I did not expect to be arrested. I am now living in Alexandria, Virginia. I gave my address c/o Howard University. We are in the process of moving. My husband is not connected with Howard, but I have friends there, both white and Negro. The address that I gave belongs to a Negro friend. My husband is part white and part Indian.

Callis Napolis Brown:

Direct examination.

By Mr. McKissick:

I live at 206 Pilot Street. I am 21 years of age, and [fol. 45] I am a senior at North Carolina College. On May 6, 1960, I went to Kress' Store and went to the counter that sells combs. This is the comb that I purchased, and this is the receipt for the purchase.

(At this point the comb was introduced into evidence, without objection, as Defendants' Exhibit D.)

Prior to February 8, 1960, I have been in Kress' Store on numerous occasions. I have never been in the section of the store where the stand-up lunch counter is located. I have never been refused service at any other counter in Kress' Store prior to February 8, 1960. After I made my purchase on May 6, 1960, I went downstairs to the lunch counter, and at that time I was the only Negro down there. Mr. Boger came over to me and said, "The custom has not been changed, and you will have to leave." I turned around and asked him if he was the manager; and I don't recall whether he said "yes" or "no." Capt. Seagroves of the Police Department said, "Fellow, the man told you to leave, so let's go." Capt. Seagroves took me by the belt up the back stairs, through Kress' Store, out the front door down Main Street to the Police Station. He did not read a warrant to me.

I first had a warrant read to me sometime late in May. When I heard that a warrant was out for me, I went to the detective's house and had him read it to me. That was Detective Frank McCrea. He lives on Nelson Street. I am a member of the Negro race. No warrant was ever read to me at the Police Station. They took my fingerprints down there. Capt. Seagroves arrested me. Lacy Streeter was not arrested at this time. I told Capt. Seagroves that it was not necessary for him to hold me by my belt because I was not going any place. And he said, "That is true, you are not." Capt. Seagroves was in uniform.

[fol. 46] Cross examination.

By Mr. Murdock:

I did not know Mr. Boger prior to that date. The movement sponsored here in Durham is strictly a student organization. The attempts to obtain service at the lunch counters and the sit-ins are one and the same. The movement is being sponsored and promoted by a student organization. I am a member of the student movement which protests against discrimination. There was an organization in existence in February to May, and I am a member of it.

I am a leader. There are approximately 14 leaders. There is no chief leader. Different people preside at different meetings. I preside at some of them. I am not ashamed of the fact that I am one of the leaders. We had a meeting on the night before May 6, 1960. We planned our strategy at that meeting. We planned to make a purchase in some other part of the store before going down to attempt to get service at the lunch counter. It was also decided that we would attempt to get service at the lunch counter. It was not decided that we would not leave until we were arrested, if we were requested to leave. However, it was discussed and decided that in the event that we were ordered to leave, we would remain until we were served. If the manager had requested that we leave, we would have left, if the manager had identified himself. We decided at our meeting if the manager requested us to leave we would leave without being served. I deny that we all went there for the purpose of being arrested so that we could make a test out of this.

Redirect examination.

By Mr. McKissick:

Exception #9:

Q. At the time that you went to the lunch counter on May 6, 1960, did you feel and believe that you had a right to service at this lunch counter?

Objection. The Court sustained objection.
Exception #9.

[fol. 47] FRANK MCGILL COLEMAN:

Direct examination.

By Mr. McKissick:

My name is Frank Coleman. I live at 2219 Club Boulevard. I was born in Vicksburg, Miss., and I now live in Pittsburgh, Pa. I am enrolled at Duke University. I am in the Graduate School of Liberal Arts and Sciences. I am

majoring in political science. I am a member of the white race.

I was in Kress' on May 6, 1960, but had not been there prior to this time. When I went into the store, I bought a Mother's Day card. Then I joined my friend Bob Markham, and he and I went downstairs and seated ourselves at the lunch counter. While I was at the lunch counter, I asked the waitress if she would serve me and she refused. I asked her why, and she said that she did not have to explain her reason to me. Mr. Boger approached us. He did not identify himself at the time. He asked us to leave, and I asked him why. He said that we were not invited guests. I asked him how he determined this. I asked him if he sent out invitations by mail. I continued to sit there, and I again asked the waitress to serve us, and she said, "no."

Mr. Boger returned accompanied by a police officer. Mr. Boger would tap the six of us seated in a row and asked us if we were going to leave. We answered, "No, not until we are served." Then the police officer would announce that you are being arrested for trespassing. I continued to ask Mr. Boger how he could determine whether or not I was an invited guest. He did not answer. The police officer informed me that, since Mr. Boger had asked me to leave, and as I had not left, I was going to be arrested for trespassing. My friend Bob Markham is a Negro. I had two other friends, who are white, who had been served that day.

Cross examination.

By Mr. Murdock:

Mr. Boger, the manager, told me to leave, and I did not [fol. 48] leave. I had never attempted to get service in Kress' prior to this date. I have carried signs in front of Kress' and other stores discouraging people to trade with them.

SHIRLEY MAE BROWN:

Direct examination.

By Mr. McKissick:

I live at 206 Pilo' Street, here in Durham. I am a Negro. I am a sophomore at North Carolina College. I am 19 years of age. These are rubber bands that I bought in Kress'. (At this point, rubber bands were introduced into evidence, without objection, as Defendants' Exhibit E.) I bought them at the third counter from the front door. After making this purchase, I went downstairs to the lunch counter. I have never been there before. I have traded often at S. H. Kress Company prior to February 8, 1960. I took a seat at the lunch counter on May 6, 1960, after one of my friends, a gentleman from Duke University, gave me his seat. My friend had purchased a glass of iced tea and a sandwich, which he gave to me. One of the waitresses at the lunch counter came over and snatched the iced tea, the plate, and the napkin. However, I was eating the sandwich.

Mr. Boger, the manager of Kress', who was later identified to me, said, "This lunch counter is open for invited guests and employees of the store. I'll have to ask you to leave," and I told him that I would when I finished eating my sandwich. At that time, a police officer said, "Let's go," and pointed his finger to a little room in back of the lunch counter. The only conversation I had with Mr. Boger was that I told him I would leave when I finished my sandwich. He did ask me to leave, but he didn't tell me who he was or that he worked at the store. He did not tell me he was the manager. He did not tell me he was a police officer. A police officer was with him. I do not know who he was. He was a tall officer.

[fol. 49] Cross examination.

By Mr. Murdock:

I made this purchase in the store because I needed these rubber bands. The purchase was 11 cents. I needed the

purchase to go in my hair. I needed the rubber bands. I did not make the purchase because I had been instructed to do so. It was an agreement for all of us to make a purchase. It was not because we made an agreement to test the law. I expected to be served because I am a citizen. When we were picketing the store, we were encouraging people to purchase if they could be served. I carried lots of signs; one of them read, "Democracy Lies Here." We were encouraging people to trade with Kress' if they could be served, and on May 6, 1960, I expected to be served. A white gentleman from Duke made a purchase for me. He was served. He was already there when I got down there. He is not one of the defendants. I didn't know his name. He came down to the church and I knew him. Mr. Boger told me to leave, and I told him that I would after I finished eating the sandwich. I did not expect to get arrested, and I did not want to be arrested.

JOHN THOMAS AVENT:

Direct examination

By Mr. McKissick:

I am 20 years old. My address is 2605 Chidley Hall, North Carolina College. My permanent address is General Delivery, Nashville, North Carolina. I went to S. H. Kress Company on May 6, 1960. I am a member of the Negro race. The item held is a pencil that I purchased from Kress' on that day. I have a receipt for my purchase. (At this point, the pencil was introduced into evidence, without objection, as Defendants' Exhibit F.) After I purchased the pencil upstairs, I went downstairs to the lunch counter. I waited a while until I could get a seat. When I got a seat, I sat down. While I was waiting to be served, [fol. 50] Mr. Boger, whom I did not know at the time, came up to me and said, "I am sorry; I am going to have to ask you to leave," and I asked him why. He said, "This counter is open only to invited guests and employees." And he said, "You are not an invited guest." Then the policeman, Mr. Cannady, said, "Let's go." He pointed me

to the direction of the other students. I felt at that time on May 6, 1960, as a citizen of the United States and as a member of the general public that, after I purchased the article upstairs, I would be welcomed downstairs.

Cross examination.

By Mr. Murdock:

I felt that I was entitled and had a right to be served at the lunch counter. I didn't know when I went in that I would not be served. I was surprised when they refused to serve me. I had not been accepted at that store's lunch counter since February. I carried signs in order to encourage patronage of the store, if the people were served downstairs at the lunch counter. I do not know whether any member of my race had been served at the lunch counter from February up to May 6, 1960, because I was not there every day. I expected to be served on May 6, because I had been served upstairs.

There were approximately 38 of us who went to the store, but not all at the same time. I was at the meeting the night before May 6. I cooperate with the people when I can, and on this night I agreed to go in with the people and take part. It was agreed that each of us would make a purchase in some part of the store before going to the lunch counter. I was not expecting to be arrested. When Mr. Boger asked me to leave, I did not leave because I did not know at that time who Mr. Boger was. I am a student, and I can cook. I have never been employed as a cook. Perhaps I carried the sign which read, "We Cook Here, Why Can't We Eat Here." When we said, "We," we were referring to my race. I have been interested in this movement since February, and I have been very active.

[fol. 51]

IN THE SUPERIOR COURT OF DURHAM COUNTY

RENEWAL OF MOTIONS AND DENIAL THEREOF

Exception #10:

Mr. McKissick: We renew our written motions to quash the indictments and also motions for dismissal as of non suit.

The Court: Motion denied.

Exception #10.

IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #11:

CHARGE OF THE COURT

Gentlemen of the Jury: The defendants, John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Donovan Phillips, and Lacy Streeter Carrole, are each being tried upon a separate bill of indictment, each of said bills of indictment charging that on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, that such defendant, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenements of S. H. Kress and Company Store, located at 101 and 103 W. Main Street in Durham, North Carolina, said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had as agent and manager the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, leave that part of the said street reserved for employees and invited guest, willfully and unlawfully refused to do so, knowing or having reason to know that he, the said defendant, had no license therefor.

The defendants, and each of them, have come into court and entered a plea of not guilty. The plea of not guilty

thus interposed challenges the credibility of the State's evidence and raises in his or her behalf a presumption of innocence. That is the defendant in this, as in all criminal [fol. 52] cases, enters upon the trial presumed to be innocent, and this presumption remains with the defendant and surrounds him or her throughout the trial, and entitles him or her to an acquittal at your hands, unless and until the State has by competent evidence satisfied you and each of you of his or her guilt beyond a reasonable doubt.

The State has offered evidence which in substances tends to show that W. K. Boger is Manager of S. H. Kress and Company's Durham store; that S. H. Kress and Company is a corporation; that this store is located at 101 and 103 on Main Street, at the corner of Main and Mangum Streets in the City of Durham; that it has two entrances on Main Street. That W. K. Boger, on May 6, 1960, was the Manager and was in control and had authority over the store; that the building and premises were owned by S. H. Kress and was being operated as a store by S. H. Kress. That he, W. K. Boger, was in the store on this date, and that the defendants John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Donovan Phillips and Lacy Streeter Carrole were in this store on that date; that they were in the vicinity of the luncheonette area downstairs; that there are five floors to this building—two sellings floors and three floors for storage. That on this date the lunch onette was in operation to serve customers that were invited and also to serve employees; that there were signs posted in the store and around the lunch department that the lunch department was open for invited guest and employees only; that there was an iron railing around this department with chains on three entrances to it.

That W. K. Boger talked with each of the seven defendants; that he told them that the lunch department was open to invited guest and employees; that they were seated in the lunch department and that he asked them to leave. They stated that they were refusing to leave until they were served. That the officers came and the officer asked [fol. 53] them to leave; that they still wouldn't leave, so

the officer arrested them. That he, W. K. Boger, as Manager of the S. H. Kress and Company Store and business on this occasion, did not want the defendants on the premises and had asked them to leave, and that they refused to do so. That none of the defendants were employees and none of the defendants had any authority to be in there when he asked them to leave.

State further offered evidence which in substance tends to show that Capt. Cannady is a member of the Durham Police Department; that on May 6, 1960, he was on duty; that as a result of a call he received he went to S. H. Kress and Company, and that he saw each of the defendants there except the defendant Coleman. That the Manager of the store was Mr. Boger, and that he heard Mr. Boger ask each of the defendants to leave in the presence of him, the officer. That each of the defendants refused to leave. That he then, the officer, told them to leave or he would have to arrest them. That they again refused to leave and that he arrested them. That they had been told by Mr. Boger that he was the Manager of S. H. Kress and Company and that he told these six defendants, all of the defendants except Coleman, that Mr. Boger was the Manager.

That's what some of the evidence for the State tends to show. What it does show, if anything, is for you to say and determine.

The defendants have offered evidence which in substance tends to show that Lacy Carrole Streeter is 24 years old; that he is a member of the Negro race; that he is a senior at North Carolina College; that he entered Kress' Store here in Durham on May 6, 1960, at about 12:30 to make a purchase; that he made a purchase and decided to go down to the lunch counter to receive service. That he sat down at the lunch counter and requested service. That he had purchased some note pads before coming down there and [fol. 54] had a sales receipt for them; that the sales receipt is dated incorrectly. That on this date he did not have any conversation with Mr. Boger and Mr. Boger did not say anything at all to him, and that Mr. Boger nor Mr. Cannady did not ask him to leave. That the police officer spoke to him and directed him toward the rear of

the lunch counter where some others of a group of people were standing.

Defendants have further offered evidence which in substance tends to show that Donovan Phillips is 19 years old; that he is a senior at North Carolina College; that he went to Kress' on this date; that there are no signs over the entrance to Kress' Store, here in Durham on Main Street, specifying race in any respect or limiting any race. That he made a purchase of lineless notebook paper; that after he purchased the notebook paper he went downstairs to the lunch counter; that nobody had ordered him out until he got to the lunch counter. That a man, later identified as Mr. Boger, told him he was not an invited guest and that he was not an employee and requested him to leave. That before he could do anything he was arrested by the officer and told to join a group back there. That he had been to Kress' Store before and had been served at the stand-up lunch counter on another floor. That he had never been to the downstairs lunch counter prior to the date that he was arrested. That he is a member of the Negro race.

Defendants have further offered evidence which in substance tends to show that Joan H. Nelson, on May 6, 1960, was a freshman student at Duke University; that she went to Kress' Store on this date by herself; that she bought a ball point pen; that she then went downstairs to the lunch counter; that she had patronized Kress' Store some half a dozen times before. That on this occasion at the lunch counter she ordered and received food; that she began eating; that the counter was almost full; that no Negroes were there. That a man came up to her and told [fol. 55] her she was not an invited guest and that she would have to leave. That he told her she was antagonizing customers. That the police said, "Let's go." That several students at North Carolina College had prior thereto come in and were sitting on either side of her; that she had offered one of them some food. That Mr. Boger did not offer to give her her money back. That she is a member of the white race, and had not prior to this occasion eaten at the lunch counter.

Defendants have further offered evidence which in substance tends to show that Callis N. Brown is a senior at

North Carolina College; that he went to Kress' Store on this occasion; that he bought a comb. That prior to February 8, 1960, he attended Kress' Store on many occasions. That he had not been to the stand-up luncheon section on May 6th—had not been to the stand-up luncheon section. That on May 6, after he made a purchase, he went downstairs and sat at the lunch counter; that Mr. Boger told him to leave, and he, Brown, asked Mr. Boger if he was the manager, and he did not answer. And that Captain Seagroves then took him to the Police Station. That it was late in May before a warrant was read to him. That he is a member of the Negro race.

The defendants have further offered evidence which in substance tends to show that Frank Coleman is enrolled as a graduate student at Duke University; that he is a member of the white race. That on May 6th, he went to Kress' Store; that he had not been there prior to this date. That he bought a Mother's Day card and then went down to the lunch counter. That he had a friend with him by the name of Bob, and that Bob is a Negro. That the waitress told him she would not serve him and that she didn't have to explain the reasons when he asked for a reason. That Mr. Boger asked him to leave and told him that they were not invited guests, and he asked Mr. Boger how they sent out invitations and how they got invitations; [fol. 56] That he did not leave, that he sat there. That, later, Mr. Boger returned with the police officer; that he saw Mr. Boger as he would come up to the others who were there, some of the people who were there, and that he saw him tap them on the shoulder and he would ask them to leave, and that they would tell him they were not going to leave until they were served, and that the officer would then tell them that they were being arrested for trespass.

Defendants have further offered evidence which in substance tends to show that Shirley Mae Brown is a member of the Negro race and is a sophomore at North Carolina College. That on this date she went to Kress' and made a purchase of some rubber bands; that afterwards she went downstairs to the lunch counter; that a white man from Duke, that she doesn't know his name, purchased some food

and gave it to her; that a waitress snatched it up. That Mr. Boger told her that "this lunch counter is open for employees and invited guests," and that she said that she would leave as soon as she finished eating the sandwich. That he did not tell her that he was the manager or that he even worked there.

The defendants have further offered evidence which, in substance, tends to show that John Thomas Avent is a member of the Negro race, and that he went to Kress' Store on this date; that he bought a pencil. That he then went downstairs to the lunch counter and sat down. That Mr. Boger came; that he did not know him at that time, but Mr. Boger came and said, "I'm sorry, I'm going to have to ask you to leave. That the counter is only open for invited guests, and you are not invited guest." That the policeman came and told him at that time and pointed toward the other students, and that he went over there where they were.

That's what some of the evidence for the defendants tends to show. What it does show, if anything, is for you [fol. 57] to say and determine.

I did not attempt to recapitulate and summarize all the evidence in the case, but I instruct you that when you retire to your room to consider and make up your verdict in the case, that it is your duty to remember and consider all of the evidence in the case, whether it has been called to your attention by the Court or not. I also instruct you that if your recollection of what the evidence was differs from what counsel for defendants, Solicitor for the State, or even the Court says the evidence was, that it is your duty to disregard what the lawyers and the Court say the evidence was, and rely upon and be governed entirely and solely upon your own recollection of what the evidence in the case was.

Gentlemen, we have a statute in this State, the pertinent parts thereof read as follows: If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor.

To constitute trespass on the lands of another, after notice or warning under this statute, three essential in

gredients must co-exist. First, the land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession. The accused must enter upon the land intentionally. And, third, the accused must do this after being forbidden to do so by the prosecutor, or someone acting for and on behalf of the prosecutor.

Although the State may prove beyond a reasonable doubt, in a prosecution under this section, that the accused intentionally entered upon the land in actual or constructive possession of the prosecutor, after being forbidden to do so by the prosecutor, and thus establish as an ultimate fact that the accused entered the locus in quo without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right. When an accused seeks to excuse an entry [fol. 58] without legal right as one taking place under a bona fide claim of right he must do two things: First, that he believed that he had a right to enter, and, second, that he had reasonable grounds for such belief.

I instruct you that if the defendants in this case, or either of them, in good faith entered the part of the building of S. H. Kress and Company, from which they were ordered to leave, if they were ordered to leave, for the purpose of ordering a meal, and other goods and merchandise sold there, and believed in good faith and had reasonable grounds to believe that they had a legal right to enter or remain and be in that portion of the building for that purpose, then it would be your duty to acquit the defendants or such of the defendants as fall within that explanation.

Now, gentlemen, the law that the Court has just read to you, or some of it, and all of it, does not mean that the burden of proof ever shifts in this case. The burden is always upon the State to satisfy you of the guilt of the defendants, and each of them, beyond a reasonable doubt. But the law does permit the defendants, and each of them, to offer evidence either by presenting witnesses or cross examination of State's witnesses as to their good faith in claiming a right to enter upon the land. And they do not have to establish this beyond a reasonable doubt; if they undertake to assert such a defense; they do not have to establish it by the greater weight of the evi-

dence. It is sufficient if the evidence on this point raises in your mind a reasonable doubt as to their guilt.

So, gentlemen, before you may convict these defendants, or either of them, the State must satisfy you from the evidence beyond a reasonable doubt of three things: first, it must satisfy you beyond a reasonable doubt, that the land, including the portion of the building referred to in the [fol. 59] evidence in this case, was on May 6, 1960, the land of S. H. Kress and Company in the sense that it was at that time in its actual or constructive possession. And I instruct you that one is in actual possession of real estate when he is present thereon and has the legal right to and does exercise dominion and control over the same. One is in constructive possession of real estate when he has the legal right to exercise dominion and control over the same, though absent therefrom.

The State must satisfy you, in the second place, beyond a reasonable doubt that the accused, and each of them, entered upon the land intentionally. Intent, in law, is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge and with full liberty of act, willing and electing to do it. Intent is an act or emotion of the mind, seldom if ever capable of direct or positive proof, but is arrived at by such just and reasonable deduction from the acts and facts proven as the guarded judgment of a reasonable, prudent and cautious man would ordinarily draw therefrom. It is usually shown only by the acts, declarations and circumstances known to the party charged with the intent. The word "intentionally" in this case embraces the phrase used in the statute "without license therefor." This expression "without license therefor" means without permission or invitation, express or implied; without legal right or without bona fide claim of right.

And the State must satisfy you beyond a reasonable doubt, in the third place, that the defendants, and each of them, entered after having been forbidden to do so by one having right of possession of said land. If a person with permission or invitation, express or implied, and with

out legal right or bona fide claim of right, intentionally enters upon the land of another and, after entering thereon is unconditionally ordered to leave and get off of the property by one in the legal possession thereof; and if [fol. 60] he refuses to leave and remains on the land, he is a trespasser from the beginning, and the statute read to you by the Court applies, and he is deemed to have been forbidden to enter the property, even though the original entrance was peaceful and authorized. However, if a person who enters by permission or invitation does not unlawfully, willfully and intentionally refuse to leave, he or she would not be guilty. And in this case, if any of these defendants was requested or ordered to leave by a duly authorized agent of S. H. Kress and Co., and S. H. Kress and Company was in possession of the premises, and ordered to leave the premises in question in this case, and such defendant did not thereafter have a reasonable time and opportunity to leave before being arrested for trespass, he or she would not be guilty of such trespass as charged in the bills of indictment herein.

The word "entry," gentlemen, as used in the statute that the Court has read to you is synonymous with the word "trespass." It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession.

I also instruct you that a person who has the legal right to possession of land is not required to explain or to give a reason for forbidding another to enter his land, and is not required to explain or give a reason for unconditionally ordering another to leave and get off of his land. And if the other has no license therefor, that is, has no permission or invitation, express or implied, has no legal right to enter or remain, or does not in good faith claim a right to enter or remain, I instruct you that the right to keep others off and to order others off of land privately owned is part and parcel of the owner's right to possession, dominion and control.

I instruct you, gentlemen, that under the evidence in this [fol. 61] case and the law applicable thereto you may, as to each of these defendants, return one of two verdicts.

You may find him or her guilty or you may find him or her not guilty, just as you find the facts to be from all of the evidence in the case, applying thereto the law as given you by the Court. The State contends that you ought to find each of the defendants guilty. The defendants contend, and each of them contends, that you ought not to find him or her guilty.

I further instruct you, gentlemen, that all persons so far as our law is concerned are equal before the law, and you are not to consider, though there has been a great deal in this case said about race, you will not consider the racial extraction of the defendants in arriving at a verdict in this case. Our Court makes no distinction between persons, whether they are rich or poor, or regardless of what their race may be, or what their circumstances in life are. You are to decide this case strictly upon the evidence and under the rules of law which the Court has given to you for your guidance.

Gentlemen, I instruct you that you may convict all of the defendants, you may convict one and not convict the other six, you can convict any number and acquit the remainder, or you may find them all not guilty, just as you find the facts to be from all the evidence in the case, applying thereto the law as given you by the Court.

Gentlemen, an agent is one who acts for or in the place of another by authority from him, one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it.

Gentlemen, when you come to consider the evidence and the weight you will give to the testimony of the different [fol. 62] witnesses, the Court instructs you that it is your duty to carefully consider and to scrutinize the testimony of a defendant when he or she testifies in his or her own behalf. And in passing upon the testimony of such, the jury ought to take into consideration the interest the witness has in the result of the action. But the Court instructs you that the law requiring to do so does not reject or impeach such evidence, and if you believe that such witness has sworn to the truth, you would give to his or her testi-

mony the same weight you would to that if any disinterested or unbiased witness. In passing upon the testimony of anyone, the jury ought to take into consideration the intelligence manifested by the witness while on the stand, the fairness or want of fairness, the reasonableness or unreasonableness, his interest, if any, in the result of the action, his bias or prejudice, if any, his means of knowing the facts to which he testified, and give to each witness such weight as to you he seems entitled to receive. You may believe all that a witness has said or none of what a witness has said, you may believe part of what a witness has said and disbelieve a part of what a witness has said. Gentlemen, this is not a question of sympathy for anyone, nor is it a question of prejudice against anyone. You are sworn jurors with a duty to perform, and that duty is to take the evidence as it came from the mouths of the sworn witnesses, and to take the law as given you by the Court, and find a verdict in this case that speaks the truth.

So, gentlemen, I come to the final portion of the charge, and I will have to repeat it as to each of the defendants.

So, I instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and [fol. 63] that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger, as such agent, unconditionally ordered the defendant John Thomas Avent to leave the said lands of S. H. Kress and Company, and further, that in so doing he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in

both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had legal right of possession of said lands, as that has been explained to you, and that said defendant John Thomas Avent had no bona fide claim of right thereto; then in that event it will be your duty to return a verdict of guilty as charged as to the defendant John Thomas Avent. If you fail to so find, it will be your duty to return a verdict of not guilty, or if upon a fair and impartial consideration of all the facts and circumstances in the case you have a reasonable doubt as to his guilt, it's your duty to give him the benefit of the doubt and acquit him.

Gentlemen, if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent uncon- [fol. 64] ditionally ordered the defendant Callis Napolis Brown to leave the said lands of S. H. Kress and Company, and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that the said defendant, Callis Napolis Brown, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to Callis Napolis Brown as

charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it's your duty to give him the benefit of the doubt and acquit him.

I further instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Shirley Mae Brown to leave the said lands of S. H. Kress and Company, and further, that in doing so he was acting as the [fol. 65] agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and, after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Shirley Mae Brown, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to Shirley Mae Brown as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to her guilt, it is your duty to give her the benefit of the doubt and acquit her.

If you find from the evidence, gentlemen, and beyond a reasonable doubt, the burden being on the State to so satisfy you, that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Frank McGill Coleman to leave the said lands of S. H. Kress and Company, and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of said S. H. Kress and Company, and that said defendant entered and re-[fol. 66] mained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Frank McGill Coleman, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to Frank McGill Coleman as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it is your duty to give him the benefit of the doubt and acquit him.

I also instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such

agent unconditionally ordered the defendant Joan Harris Nelson to leave the said lands of S. H. Kress and Company; and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Joan Harris Nelson, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to the defendant Joan Harris Nelson, as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to her guilt, it is your duty to give her the benefit of the doubt and acquit her.

[fol. 67]

I further instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Donovan Phillips to leave the said lands of S. H. Kress and Company; and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands in-

tentionally as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been ordered by [fol. 68] him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Donovan Phillips, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to the defendant Donovan Phillips as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or if, upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it is your duty to give him the benefit of the doubt and acquit him.

I further instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Lacy Carrole Streeter to leave the said lands of S. H. Kress and Company; and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company . . .

Gentlemen, it has been called to my attention that I have called the defendant Lacy Carrole Streeter, throughout, Lacy Streeter Carrole. It is an inadvertence on my part, gentlemen. I instruct you that when I have said Lacy Streeter Carrole, I was referring and have referred at all times and you shall take it to mean the defendant Lacy Carrole Streeter.

[fol. 69] . . . And that said defendant entered and remained upon the said lands intentionally, as that term has

been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Lacy Carrole Streeter, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to the defendant Lacy Carrole Streeter as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or if, upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it is your duty to give him the benefit of the doubt and acquit him.

You may retire, gentlemen, and say how you find as to each defendant.

Exception #11

IN THE SUPERIOR COURT OF DURHAM COUNTY

MOTIONS TO SET ASIDE VERDICT, FOR NEW TRIAL AND IN ARREST OF JUDGMENT AND DENIALS THEREOF

Exception #12:

Mr. Marsh: Motion to set aside the verdict as being contrary to the weight of the evidence.

Court: Motion overruled.

Defendants and each of them except.

Exception #12.

Exception #13:

Mr. Marsh: We move for new trial for errors committed during the trial.

Exception #13.

Exception #14:

Mr. Marsh: We make a motion in arrest of judgment.

Court: Defendants, and each of them, move in arrest of judgment. Motion overruled. Defendants and each of them except.

Exception #14.

[fol. 70]

IN THE SUPERIOR COURT OF DURHAM COUNTY

ASSIGNMENTS OF ERROR

The defendants assign for error the following:

Assignment of Error 1: The action of the Court, as set out in Exception #1 (R pp 9-12), in overruling Negro Defendants' Motions to Quash.

Assignment of Error 2: The action of the Court, as set out in Exception #2 (R pp 12-14), in overruling white defendants' Motions to Quash.

Assignment of Error 3: The action of the Court, as set out in Exception #3 (R pp 24-25), in permitting Capt. R. J. Cannady to testify, as follows:

Q. You know that Mr. Boger was the manager of the store?

A. Yes, sir.

Q. And they knew that he was and had been so told by you and by him?

A. Yes, sir.

Q. That he was manager and in charge?

A. Yes, sir.

Mr. Marsh: I object. I can't hear the questions and I can't hear the answers.

Court: Speak a little louder then, Mr. Solicitor and Mr. Witness.

Mr. Marsh: I want her to read back the last questions that Mr. Murdock asked.

Court: Read them to him, Miss Nelda.

Reporter: "Q. You knew that Mr. Boger was the manager of the store? A. Yes, sir. Q. And they knew that he was and had been so told by you and by him?"

Mr. Marsh: Now, I object to as leading the witness.

Court: The objection comes too late. Put in this. The objection comes after the witness has answered the question and it comes too late.

Mr. Marsh: I couldn't hear the question, may it please the Court.

[fol. 71] Court: Well, there are five others sitting there and there was no objection made.

Mr. Marsh: Motion to strike the answer relative to the last question asked by Mr. Murdock.

Assignment of Error #4: The action of the Court, as set out in Exception #4 (R pp 26-30), in overruling Negro defendants' motions for judgment as of nonsuit at the close of all of the evidence.

Assignment of Error 5: The action of the Court, as set out in Exception #5 (R pp 30-33), in overruling white defendants' motions for judgment as of nonsuit at the close of all of the evidence.

Assignment of Error 6: The action of the Court, as set out in Exception #6 (R p 34), in overruling defendants' further motion.

Assignment of Error 7: The action of the Court, as set out in Exception #7 (R pp 34-35), in overruling defendants' further motion.

Assignment of Error 8: The action of the Court, as set out in Exception #8 (R p 35), in overruling defendants' further motion.

Assignment of Error 9: The action of the Court, as set out in Exception #9 (R p 46), in refusing to allow defendants' counsel to ask the following question on direct examination:

Q. At the time that you went to the lunch counter on May 6, 1960, did you feel and believe that you had a right to service at this lunch counter?

Assignment of Error 10: The action of the Court, as set out in Exception #10 (R p 51), in overruling defendants' motion to quash the indictments and motions for dismissal as of nonsuit made at the close of all of the evidence.

[fol. 72], Assignment of Error 11: The action of the Court, as set out in Exception #11 (R pp 51-69), in charging the jury as appears on Record pages 51 through 69.

Assignment of Error 12: The action of the Court, as set out in Exception #12 (R p 69), in overruling defendants' motion to set aside the verdict as being contrary to the greater weight of the evidence.

Assignment of Error 13: The action of the Court, as set out in Exception #13 (R p 69), in overruling defendants' motion for a new trial for errors committed during the trial.

Assignment of Error 14: The action of the Court, as set out in Exception #14 (R p 69), in overruling defendants' motion in arrest of judgment.

IN THE SUPERIOR COURT OF DURHAM COUNTY

STIPULATIONS

I. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the Court was duly and properly organized.

II. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that before a plea was entered as to the Bill of Indictment against each of the Negro Defendants, the written motion, as appears on Record page

10, to quash the Bill of Indictment, was made separately for each of the Negro Defendants.

[fol. 73] III. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that before the plea was entered as to the Bill of Indictment against each of the white defendants, the written motion, as appears on Record page 12, to quash the Bill of Indictment, was made separately for each of the white defendants.

IV. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the written motion for nonsuit, as appears on Record page 26 was made separately, as to each of the Negro defendants in the case.

V It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the written motion for nonsuit, as appears on Record page 30, was made separately, as to each of the white defendants in the case.

VI. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the Exhibits A through F constitute purchases made by each defendant who testified in the case, as appear in the record.

[fol. 74] VII. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H.

Murdock), Solicitor for the Tenth Soliciforial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the written motions to quash the indictments as appears on Record page 10, et seq., and motions for nonsuit, as appears on Record page 26, et seq., were made at the close of all the evidence.

VIII. It is hereby stipulated by Counsel for defendants that defendants made no oral exception to the Judge's ruling on their motion to strike which ruling constitutes exception three (3) of this record; however, defendants feel that under our rules an exception was deemed to have been made to the Judge's ruling.

William A. Marsh, Jr., of Counsel for Defendants.

IN THE SUPERIOR COURT OF DURHAM COUNTY

STIPULATION AS TO CASE ON APPEAL

The foregoing is tendered by the defendants as their case on appeal to the Supreme Court. This 3rd day of October, 1960.

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson II, F. B. McKissick, L. C. Berry, Jr., Attorneys for Defendant Appellants.

Service of the foregoing case on appeal and assignments of error accepted, this 5 day of October, 1960.

W. H. Murdock, Solicitor.

It is further stipulated that the service of this case on appeal and the counter-case on appeal were made in apt time.

This 5th day of October, 1960.

William A. Marsh, Jr., M. Hugh Thompson, C. O. [fol. 75] Pearson, W. G. Pearson, II, F. B. McKissick, L. C. Berry, Jr., Attorneys for Defendant Appellants.

W. H. Murdock, Solicitor.

It Is Stipulated And Agreed by and between the Solicitor for the State of North Carolina, William H. Murdock, and the Attorneys for defendants, F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, that the foregoing 76 pages, together with this page, shall constitute the case on appeal to the Supreme Court in this cause.

W. H. Murdock, Solicitor, William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, II, F. B. McKissick, L. C. Berry, Jr., Attorneys for Defendant Appellants.

[fol. 76] [File endorsement omitted]

IN THE SUPREME COURT OF NORTH CAROLINA

Fall Term 1960

No. 654—Durham

STATE

v.

JOHN THOMAS AVENT

STATE

v.

LACY CARROLE STREETER

STATE

v.

FRANK MCGILL COLEMAN

STATE

v.

SHIRLEY MAE BROWN

STATE

v.

DONOVAN PHILLIPS

STATE

v.

CALLIS NAPOLIS BROWN

STATE

v.

JOAN HARRIS NELSON

OPINION—January 20, 1961

Appeal by defendants from Mallard, J., 30 June 1960 Criminal Term of Durham.

Seven criminal actions, based on seven separate indictments, which were consolidated and tried together.

[fol. 77] The indictment in the case of defendant John Thomas Avent is as follows: "The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner,

being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The other six indictments are identical, except that each indictment names a different defendant.

The State's evidence tends to show the following facts:

On 6 May 1960 S. H. Kress and Company was operating a general variety store on Main Street in the city of Durham. Its manager, W. K. Boger, had complete control and authority over this store. The store has two selling floors and three stockroom floors, and is operated to make a profit. On the first floor the store has a stand-up counter, where it serves food and drinks to Negroes and White people. The luncheonette department serving food is in the rear of the basement on the basement floor. On 6 May 1960 S. H. Kress and Company had iron railings, with chained entrances, separating the luncheonette department from other departments in the store, and had signs posted over that department stating the luncheonette department was [fol. 78] operated for employees and invited guests only. Customers on that date in the luncheonette department were invited guests and employees.

On 6 May 1960 these seven defendants, five of whom are Negroes and two of whom (Joan Harris Nelson and Frank McGill Coleman) are members of the White race, were in the store. Before the seven defendants seated themselves in the luncheonette department, and after they seated themselves there, W. K. Boger had a conversation with each one of them. He told them that the luncheonette department was open for employees and invited guests only, and asked them not to take seats there. When they seated themselves there, he asked them to leave. They

refused to leave until after they were served. He called an officer of the city police department. The officer asked them to leave. They did not do so, and he arrested them, and charged them with trespassing. The seven defendants were not employees of the store. They had no authority or permission to be in the luncheonette department.

On cross-examination W. K. Boger testified in substance: S. H. Kress and Company has 50 counters in the store, and it accepts patronage of Negroes at those 50 counters. White people are considered guests. Had the two White defendants come into the store on 4 May 1960, I would not have served them in the luncheonette department for the reason they had made every effort to boycott the store. He would have served the White woman defendant, but he asked her to leave when she gave her food to a Negro. The object of operating our store in Durham is definitely to make a profit. It is the policy of our store to operate all counters dependent upon the customs of the community. It is our policy in Durham to refuse to serve Negroes at the luncheonette department downstairs in our seating arrangement. It is also our policy there to refuse to serve White people in the company of Negroes. We had signs all over the luncheonette department to the effect that it was open for employees and invited guests.

Captain Cannady of the Durham Police Department tes- [fol. 79] tified in substance: As a result of a call to the department he went to S. H. Kress and Company's store. He saw on 6 May 1960 all the defendants, except Coleman, seated at the counter in the luncheonette department. He heard W. K. Boger ask each one of them to leave, and all refused. He asked them to leave, and told them they could either leave or be arrested for trespassing. They refused to leave, and he charged them with trespassing. He knew W. K. Boger was manager of the store. He makes an arrest when an offense is committed in his presence, and the defendants were trespassing in his presence.

When the State rested its case, all seven defendants testified. The five Negro defendants testified in substance: All are students at North Carolina College for Negroes in Durham. Prior to 6 May 1960, Negroes, including some of the Negro defendants, had been refused service by S. H.

Kress and Company in its luncheonette department. All are members of a student organization, which met on the night of 5 May 1960, and planned to go the following day to Kress' store, make a purchase, and then to go to the luncheonette department, take seats, and request service. The following day the five Negro defendants did what they planned.

The White woman defendant, Joan Harris Nelson, is a student at Duke University. Prior to 6 May 1960 she had not attended the meetings at the North Carolina College for Negroes for the purpose of securing service at the luncheonette department of the Kress store, though she has attended some of the meetings since then. She had been on the picket lines in front of the store. On 6 May 1960 she went into the Kress store, bought a ball-point pen, went to the luncheonette department, and took a seat. She was served, and while eating she offered to buy some food for Negroes from the North Carolina College, who were sitting on each side of her. When she was served food, no Negroes were in the luncheonette department. Mr. W. K. Boger asked her to leave because she was not invited, and was antagonizing customers. She did not leave, and was arrested.

[fol. 80] The White male defendant, Frank McGill Coleman, is a student at Duke University. On 6 May 1960 he went into the Kress store, bought a mother's day card, joined his friend, Bob Markham, a Negro, and they went to the luncheonette department, and seated themselves. He asked for service, and was refused. Mr. W. K. Boger asked them to leave, telling them they were not invited guests, and he refused to do so, and was arrested. Prior to this date he had carried signs in front of the Kress store and other stores discouraging people to trade with them.

Some, if not all, of the defendants had been engaged previously in picketing the Kress store, and in urging a boycott of it, unless their demands for service in the luncheonette department were acceded to.

Jury Verdict: All the defendants, and each one of them, are guilty as charged.

From judgments against each defendant, each defendant appeals.

T. W. Bruton, Attorney General, and Ralph Moody, Assistant Attorney General, for the State.

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, F. B. McKissick and L. C. Berry, Jr., for Defendants, Appellants.

Parker, J. Each defendant—five of whom are Negroes and two members of the White race—before pleading to the indictment against him or her made a motion to quash the indictment. The court overruled each motion, and each defendant excepted. The motions were made in apt time. S. v. Perry, 248 N. C. 334, 103 S. E. 2d 404; Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839; 27 Am. Jur., Indictments and Information, §141.

At the close of all the evidence each defendant made a motion for judgment of compulsory nonsuit. Each motion was overruled, and each defendant excepted.

S. H. Kress and Company is a privately owned corpora- [fol. 81] tion, and in the conduct of its store in Durham is acting in a purely private capacity to make a profit for its shareholders. There is nothing in the evidence before us, or in the briefs of counsel to suggest that the store building in which it operates is not privately owned. In its basement in the luncheonette department it operates a restaurant. "While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating-house and cook-shop, to any other place where eatables are furnished to be consumed on the premises. Citing authority. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat." S. v. Shoaf, 179 N. C. 744, 102 S. E. 705. To the same effect see, 29 Am. Jur. (1960), Innkeepers, §9, p. 12. In Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 27 N. W. 586, the Court said: "A 'restaurant' has no more defined meaning, (than the English word shop), and is used indiscriminately for all places where refreshments can be had, from the mere

eating-house or cookshop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed o. the premises is subordinate." Quoted with approval in M. higan Packing Co. v. Messaris, 257 Mich. 422, 241 N. W. 236, and restated in substance in 43 C. J. S., Innkeepers, §1, subsection b, p. 1132.

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to [fol. 82] make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. S. v. Clyburn, 247 N. C. 455, 101 S. E. 2d 295; Williams v. Howard Johnson's Restaurant, 268 F. 2d 845; Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124, affirmed by the U. S. Court of Appeals for the 4th Circuit 27 December 1960, —— F. 2d ——; Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d 906; Wilmington Parking Authority v. Burton (Del.), 157 A. 2d 894; Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 773. See 10 Am. Jur., Civil Rights, §21; Powell v. Utz, 87 F. Supp. 811; and Annotation 9 Am. & Eng. Ann. Cas. 69—statutes securing equal rights in places of public accommodation. We have found no case to the contrary after diligent search, and counsel for defendants have referred us to none.

In Alpaugh v. Wolverton, *supra*, the Court said: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. Citing authority. His rights and responsibilities are more like those of a shopkeeper. Citing authority. He is under no common-law duty to serve every one who applies to him. In the ab-

sence of statute, he may accept some customers and reject others on purely personal grounds. Citing authority."

In Boynton v. Virginia, 5 December 1960, —— U. S. ——, ——L. Ed. ——, the Court held that a Negro passenger in transit on a paid Interstate Trailways' journey had a right to food service under the Interstate Commerce Act in a Bus Terminal Restaurant situate in the Bus Station, and operated under a lease by a company not affiliated with the Trailways Bus Company. Then the Court in the majority opinion deliberately stated: "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

In S. v. Clyburn, *supra*, the defendants were tried on similar warrants charging that each defendant unlawfully [fol. 83] entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor." Coletta and Porcelli did business under the trade name of Royal Ice Cream Company, retailing ice cream and sandwiches. The building in which they did business is separated by partition into two parts. One part has a door opening on Dowd Street, the other a door opening on Roxboro Street. Each portion is equipped with booths, a counter and stools. Over the Dowd Street door is a large sign marked Colored, over the Roxboro Street door is a similar sign marked White. Sales are made to different races only in the portions of the building as marked. Defendants, all Negroes, went into the building set apart for White patrons, and requested service. Coletta asked them to leave. They refused to do so, and they were arrested by a police officer of the city of Durham. All were convicted, and from judgments imposed, all appealed to the Supreme Court. We found No Error in the trial. The Court in its opinion said: "The right of an operator of a private enterprise to select the patrons he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens

County Jockey Club, 72 N. E. 2d 697 (N. Y.); Terrell Wells Swimming Pool v. Rodriguez, 182 S. W. 2d 824 (Tex.); Booker v. Grand Rapids Medical College, 120 N. W. 589 (Mich.); Younger v. Judah, 19 S. W. 1109 (Mo.); Goff v. Savage, 210 P. 374 (Wash.); De La Ysla v. Publix Theatres Corporation, 26 P. 2d 818 (Utah); Brown v. Meyer Sanitary Milk Co., 96 P. 2d 651 (Kan.); Horn v. Illinois Cent. R. Co., 64 N. E. 2d 574 (Ill.); Coleman v. Middlestaff, 305 P. 2d 1020 (Cal.); Fletcher v. Coney Island, 136 N. E. 2d 344 (Ohio); Alpaugh v. Wolverton, 36 S. E. 2d 906 (Va.). The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."

[fol. 84] In an Annotation in 9 A. L. R., p. 379, it is said: "It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." The Annotation cites cases from eight states supporting the statement. See to the same effect, Brookside Pratt Min. Co. v. Booth, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417, and Annotation in 33 A. L. R. 421.

This is said by Holmes, J., for the Court in Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256, 60 L. Ed. 984, 987, a suit to restrain the Public Utilities Commission from exercising jurisdiction over the business of a taxicab company: "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed: But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes . . . ."

None of the cases cited in defendants' brief are applicable to the situation which obtain in the instant cases. For instance, Cooper v. Aaron, 358 U. S. 1, 3 L. Ed. 2d 5—public education; Boman v. Birmingham Transit Co., 280 F. 2d 531—public transportation; Valle v. Stengel, 176

F. 2d 697—a case in respect to an amusement park in the State of New Jersey, which State has a statute, R. S. 10:1-3, N. J. S. A., providing that no proprietor of a place of public resort or amusement, " . . . shall directly or indirectly refuse, withhold from, or deny to, any person any of the accommodations, advantages, facilities or privileges thereof . . . on account of race, creed or color," R. S. 10:1-6, N. J. S. A.

[fol. 85] "The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." 11 Am. Jur., Constitutional Law, 335.

G. S. 14-134 has been the statute law of this State for nearly a hundred years. It reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." Then follows a proviso as to obtaining a license to go upon land of another to look for estrays. This statute is color blind. Its sole purpose is to protect people from trespassers on their lands. It is concerned with only three questions. One, was the land in either the actual or constructive possession of another? Two, did the accused intentionally enter upon the land of another? Three, did the accused so enter upon the land of another after being forbidden to do so by the person in possession? S. v. Baker, 231 N. C. 136, 56 S. E. 2d 424.

G. S. 14-126 has been the statute law of this State for many years, and reads: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable

and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." This statute is also color blind. Its purpose is "to protect actual possession only." S. v. Baker, *supra*. We have repeatedly held in applying [fol. 86] G. S. 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. The word "entry" as used in each of these statutes is synonymous with the word "trespass." S. v. Clyburn, *supra*.

The officer of the city of Durham had a right and duty to arrest all seven defendants in the luncheonette department of the Kress store, because all of them were committing misdemeanors in his presence. G. S. 15-41. There is no merit in their contention that this constituted State action denying them rights guaranteed to them by the 14th Amendment to the Federal Constitution and by Article I, §17, of the State Constitution. S. v. Clyburn, *supra*.

Defendants, in essence contend that the indictments should be quashed and the cases nonsuited because the judicial process here constitutes State action to enforce racial segregation in violation of their rights under the due process clause and under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, and in violation of their rights under Article I, §17, of the State Constitution, and further that G. S. 14-134 and G. S. 14-126 are being unconstitutionally applied for the same purpose. Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner. There is no merit to this contention.

The Court said in Shelley v. Kramer, 334 U. S. 1, 92 L. Ed. 1161, 3 A. L. R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private

conduct, however discriminatory or wrongful." This in-
[fol. 87] terpretation has not been modified: Collins v. Hardyman, 341 U. S. 651, 95 L. Ed. 1253; District of Columbia v. Thompson Co., 346 U. S. 100, 97 L. Ed. 1480.

Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—, and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. 14-134 and G. S. 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the clear legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. 14-134 and G. S. 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the defendants guaranteed to them by Article I, § 17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law, for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right
[fol. 88] to have his land free from unlawful invasion by

Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, §76, p. 167; 6 C. J. S., Assault and Battery, §20, (2). This is said in 4 Jur., Assault and Battery, §76, p. 168: "Even though the nature of the business of the owner of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful." It is further said in the same work, same article, §78: "The right lawfully to eject trespassers is not limited to the owner or occupier of the premises, but may be exercised by his agent in any case where the principal might exercise the right." The motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose. 6 C. J. S., Assault and Battery, p. 821. White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth.

This is said in an article designated "The Meaning of State Action" by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December 1960, Vol. 60, No. 8, in note 134, page 1122: "State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (Shelley v. Kramer, [fol. 89] 334 U. S. 1, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra* note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case."

In Slack v. Atlantic White Tower System, Inc., *supra*, the Court said: "No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency."

In S. v. Cooke, 248 N. C. 485, 103 S. E. 2d 846, the defendants were convicted and sentenced on a charge that they did "unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises." We found no error. Their appeal was dismissed by a divided court by the United States Supreme Court. Wolfe v. North Carolina, 364 U. S. 177, 4 L. Ed. 2d 1650. In neither the majority opinion nor in the minority opinion was the question of State action referred to. It seems that if the United States Supreme Court had thought that the arrest and prosecution was State action, it would have reversed our decision. It seems further that the action of that Court in dismissing the appeal means that a State has the power to enforce through arrest and an action for trespass the discrimination of a private owner of a private business operated on premises privately owned.

There is no merit in defendants' contention that all the cases should be nonsuited, because the demands that they leave Kress' store, their arrest by an officer of the City of Durham, and the judicial process here, is an unconstitutional interference with their constitutional rights of [fol. 90] free speech, and of assembly to advocate and persuade for a termination of racial discrimination.

No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right. The answer to this contention is given by the Court in Kovacs v. Cooper, 336 U. S. 77, 93 L. Ed. 513, 10 A. L. R. 2d 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. The Saia Case recognized that in this field by

stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, Schenck v. United States, 249 US 47, 52, 63 L ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.' Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

The evidence in these cases shows that the White defendants, and most, if not all, of the Negro defendants were freely and without molestation exercising these rights upon the streets of the city of Durham. However, they had no constitutional right to exercise these rights as trespassers in Kress' store in violation of G. S. 14-134 and G. S. 14-126.

There is no merit in defendants' contention that the indictments should be quashed, and the cases nonsuited, because S. H. Kress and Company is licensed by the city of Durham to operate a retail store, and therefore racial discrimination in the store cannot be enforced. The license is not in the record before us, and there is no suggestion by defendants that the license issued to S. H. Kress and Com- [fol. 91] pany contained any restrictions as to whom S. H. Kress and Company should serve. The answer to this contention, showing it is without merit, is set forth in S. v. Clyburn, *supra*, in Slack v. Atlantic White Tower System, Inc., *supra*, and in Williams v. Howard Johnson's Restaurant, *supra*; and defendants' contention is overruled upon authority of those cases. In the last case the Court said: "The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment."

Defendants further contend that the indictments should be quashed, and the cases nonsuited, because G. S. 14-134

is too indefinite and vague to be enforceable under the due process clause of the 14th Amendment and under Article I, §17, of the State Constitution, in that the statute does not require the person in charge of the premises to identify himself, and in that W. K. Boger did not identify himself when he asked them not to enter the luncheonette department, and when he asked them to leave after they seated themselves. This contention is not tenable.

G. S. 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

On a motion for judgment of compulsory nonsuit the State's evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. S. v. Corl, 250 N. C. 252, 108 S. E. 2d 608. In our opinion, when the State's evidence is so considered, it permits the reasonable inference that all the defendants knew when W. K. Boger forbade them to go upon or enter the luncheonette department, and requested them to leave after they had seated themselves there, he was the agent of S. H. Kress and Company in charge of the store, and we so hold.

[fol. 92]

Defendants contend that all the cases should be nonsuited because the evidence is insufficient to carry the case to the jury. All defendants introduced evidence. Having done so, they waived their motions for judgment of involuntary nonsuit which they had made at the close of the State's case, and must rely on their similar motions made at the close of all the evidence. G. S. 15-173.

Considering the State's evidence in the light most favorable to the State, and not taking defendants' evidence into consideration unless favorable to the State, or except when not in conflict with the State's evidence, it may be used

to explain or make clear the State's evidence, (S. v. Nall, 239 N. C. 60, 79 S. E. 2d 354), as we are required to do in passing upon defendants' motions made at the close of all the evidence, it tends to show that all the defendants without legal or constitutional right or bona fide claim of right entered the luncheonette department of S. H. Kress and Company after having been forbidden by W. K. Boger, the manager and agent of S. H. Kress and Company there, to do so, and after they had been requested by him to leave, refused to do so. The fact, that the violations by all defendants of G. S. 14-126 and G. S. 14-134 were intentional, is shown clearly by their acts, by the two White defendants and by most, if not all, of the Negro defendants in urging people to boycott the Kress store, and further by the plan entered into by the Negro defendants on the night of 5 May 1960 to go the following day to the Kress store, enter the luncheonette department there, take seats, and demand service. The evidence was sufficient to carry the cases to the jury, and we so hold.

The motions to quash the indictments raise most, if not all, of the constitutional questions raised by the motions for judgments of compulsory nonsuit made at the close of [fol. 93] all the evidence. All these questions have been considered by the Court and most, if not all, discussed in the opinion. In our opinion, and we so hold, the trial court properly overruled the motions to quash the indictments, and correctly submitted all the cases to the jury.

Defendants' assignments of error relating to the evidence are without merit, and do not justify discussion.

Defendants' assignment of error to the charge of the court to the jury is to the whole charge, without any statement as to what part of it is, as they contend, error. Such an assignment of error is too general and indefinite to present any question for decision. S. v. Dillard, 223 N. C. 446, 27 S. E. 2d 85, and cases there cited. In that case the Court said: "Unpointed, broadside exceptions will not be considered. Citing authority. The Court will not go on a voyage of discovery to ascertain wherein the judge failed to explain adequately the law in the case. Citing authority. The assignment must particularize and point

out specifically wherein the court failed to charge the law arising on the evidence." Further, defendants in their brief make no mention of the charge, and no exception to the charge appears in the record, except in the assignment of error. An assignment of error will be disregarded when it is not supported by an exception in the record, but only by an exception appearing in the assignment of error. Barnette v. Woody, 242 N. C. 424, 88 S. E. 2d 223; Watters v. Parrish, 252 N. C. 787, 115 S. E. 2d 1. The assignment of error as to the charge as a whole, not being mentioned, in defendants' brief is taken as abandoned by defendants. Rules of Practice in the Supreme Court, Rule 28, 221 N. C. 544; S. v. Atkins, 242 N. C. 294, 87 S. E. 2d 507. However, a reading of the charge, which is in the record, shows that the trial judge correctly declared and explained the law arising on the evidence given in the cases, as required by G. S. 1-180, and in particular instructed the jury to the effect that if the defendants entered the luncheonette [fok 94] department of the Kress store after being forbidden under a *bona fide* claim of right and if they had reasonable grounds for such belief, and refused to leave after they had been requested to do so under such claim, as they contend their evidence tended to show, then there would be no criminal responsibility, and it would be the duty of the jury to acquit all defendants. S. v. Clyburn, *supra;* S. v. Fisher, 109 N. C. 817, 13 S. E. 878. This Court said in S. v. Crawley, 103 N. C. 353, 9 S. E. 409, which was a criminal action for entry upon land after being forbidden: "A mere *belief* on his part that he had such claim would not be sufficient—he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. S. v. Bryson, 81 N. C. 595." This Court said in S. v. Wells, 142 N. C. 590, 55 S. E. 210: "True we have held in several well-considered decisions, that when the State proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim, the defendant must show that he not only believed he had a right to enter, but that he had

reasonable grounds for such belief. S. v. Glenn, 118 N. C., 1194; S. v. Durham, 121 N. C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted." Defendants have nothing to complain of in respect to the charge, and their counsel evidently thought so by not mentioning the charge in their joint brief filed with us.

Defendants' motions in arrest of judgment, which the court overruled, and which defendants assign as error, are not mentioned in defendants' brief, and are taken as abandoned by defendants.

[fol. 95] All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution.

No Error.

[fol. 96]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE

v.

JOHN THOMAS AVENT, LACY CARROLE STREETER, FRANK McGILL COLEMAN, SHIRLEY MAE BROWN, DONOVAN PHILLIPS, CALLIS NAPOLIS BROWN and JOAN HARRIS NELSON

CLERK'S CERTIFICATE

Appeal docketed 8 November 1960.

Case argued 29 November 1960.

Opinion filed 20 January 1961.

Final judgment entered 20 January 1961.

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 6th day of March, 1961.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina.

[fol. 97]

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 4th, 1961.

Earl Warren, Chief Justice of the United States.

Dated this 4th day of April, 1961.

[fol. 98]

SUPREME COURT OF THE UNITED STATES

No. 85—October Term, 1961

JOHN THOMAS AVENT, *et al.*, Petitioners,

vs.

NORTH CAROLINA

ORDER ALLOWING CERTIORARI—June 25, 1962.

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.